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2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK

4 -----x
5 NEW YORKERS FOR RELIGIOUS LIBERTY, INC.,
6 GENNARO AGOVINO, CURTIS CUTLER, LIZ
7 DELGADO, JANINE DEMARTINI, BRENDAN
8 FOGARTY, SABINA KOLENOVIC, KRISTA O'DEA,
9 DEAN PAOLILLO, DENNIS PILLET, MATTHEW
10 RIVERA, LAURA SATIRA, FRANK SCHIMENTI
11 and JAMES SCHMITT, individually and on
12 behalf of all others similarly situated,
13 Plaintiffs,

14 -against-

15 THE CITY OF NEW YORK, ERIC ADAMS, in his
16 official capacity as Mayor of the City of
17 New York, DAVE CHOKSHI, in his official
18 capacity as Health Commissioner of the
19 City of New York, AND ROBERTA REARDON, in
20 her capacity as new York State Commissioner
21 of Labor,

22 Defendants.

23 Case No.: 1:2022-cv-00752
24 -----x

25 (Via Zoom Videoconference)

May 24, 2022

9:11 a.m.

Video-recorded Videoconference

Deposition of ERIC EICHENHOLTZ, before Kristi
Cruz, a Stenographic Reporter and Notary
Public of the State of New York.

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A P P E A R A N C E S (cont'd) :

ALSO PRESENT :

DEAN PAOLILLO

BARRY BLACK

KRISTA O'DEA

FRANK SCHIMENTI

SABINA KOLENOVIC

LIZ DELGADO

GENNARO AGOVINO

BRANDON BABWAH, Paralegal

ROCCO MERCURIO, Videographer

PROCEEDINGS

THE VIDEOGRAPHER: We are now going on the record. Today is May 24, 2022, and the time is approximately 9:11. Please note that this deposition is being conducted virtually. Quality of the recording depends on the quality of the camera and internet connection of the participants. What is heard from the witness and seen on the screen is what will be recorded. Audio and video recording will continue to take place until all parties agree to go off.

This is the remote video deposition of Eric Eichenholtz in the matter of New Yorkers For Religious Liberty Inc. et al. versus the City of New York et al., filed in the U.S. Eastern District Court of New York, case number 1:2022cv00752. My name is Rocco Mercurio, and the court reporter is Kristi Cruz, and we are from Veritext.

Will counsel please introduce yourselves and who you represent for the record.

MR. NELSON: For the plaintiffs,

1 E. EICHENHOLTZ

2 Jonathan Nelson of Nelson Madden Black
3 LLP.

4 MS. CHILD: For the plaintiffs, this
5 is Sarah Child from Nelson Madden Black LLP.

6 MR. NELSON: Sujata, will you please
7 introduce yourself? Perhaps you will do
8 so later on; perhaps she's away.

9 Defendants' counsel?

10 MR. HAIDER: Bilal Haider for the
11 defendants on behalf of the Corporation
12 Counsel.

13 MS. MINICUCCI: Lora Minicucci for
14 defendants.

15 MS. O'CONNOR: Andrea O'Connor for
16 defendants.

17 THE VIDEOGRAPHER: Okay. Will the
18 court reporter please swear the witness.

19 E R I C E I C H E N H O L T Z,

20 called as a witness, having been duly
21 sworn by a Notary Public, was examined
22 and testified as follows:

23 EXAMINATION BY

24 MR. NELSON:

25 Q. Good morning, Mr. Eichenholtz.

1 E. EICHENHOLTZ

2 A. Good morning.

3 Q. Thank you for being here, although
4 your here is not here; it's where you are in
5 your office, I suppose.

6 A. Virtually, yes.

7 Q. So you're here for the deposition,
8 the 30(b)(6) deposition on behalf of the City
9 defendants in this lawsuit. And you're an
10 attorney; is that correct?

11 A. That's correct.

12 Q. And have you ever taken part in
13 depositions before?

14 A. Never as a witness, but as counsel,
15 I've taken part in many depositions, yes.

16 Q. Okay. So you know the rules.

17 A. Yes.

18 Q. Very good. We can dispense with
19 those, I think.

20 One thing we should discuss is
21 breaks. There's a very important aspect with
22 respect to breaks, and that is that breaks
23 should not occur between the question that is
24 posed and the answer that's given, and I would
25 ask, also, that that extend to communications

1 E. EICHENHOLTZ

2 between the witness and counsel. You have
3 counsel sitting right next to you. There's
4 potential for passing notes, and I would
5 direct you not to do that, please.

6 A. Understood.

7 Q. Any time somebody needs a break in
8 this matter, then please raise that for the --
9 you know, raise that on the record and, you
10 know, we'll be very generous with respect to
11 that. Anybody who needs a bathroom break gets
12 it. And we will be breaking for lunch, if we
13 continue that long. So we can certainly
14 negotiate the amount of time that's necessary
15 for lunch, but I would say it should be at
16 least probably 45 minutes. Is that acceptable
17 to City counsel?

18 MR. HAIDER: Bilal Haider, yes, it
19 is acceptable.

20 MR. NELSON: Very good.

21 Q. So, Mr. Eichenholtz, what is your
22 position?

23 A. I am the Chief Assistant Corporation
24 Counsel for employment policy and litigation.

25 Q. Okay. And how long have you been

1 E. EICHENHOLTZ

2 doing that?

3 A. Since October of 2021.

4 Q. You know, that's fairly recent.
5 What were you doing before then?

6 A. Before then, I was the Division
7 Chief of The Labor and Employment Law Division
8 here at the New York City Law Department.

9 Q. And how long did you do that?

10 A. Since February of 2013.

11 Q. And you are testifying as a Rule
12 30(b)(6) witness on behalf of all of the City
13 defendants; is that correct?

14 A. Correct. On behalf of the corporate
15 entity, the City of New York, yes.

16 Q. Now, do you have a personal
17 knowledge of the matters that are to be
18 covered by today's deposition by order of the
19 magistrate judge?

20 A. Some, I'd imagine.

21 Q. Okay. And what is the basis for the
22 personal knowledge that you have with respect
23 to the topics that have been mentioned in the
24 judge's order?

25 A. I was involved with the formation

1 E. EICHENHOLTZ

2 and have served on the Citywide Appeals Panel
3 for the New York City employee vaccine
4 mandate.

5 Q. And how were you involved in the
6 formation of the panel?

7 A. I was consulted and a part of the
8 team that put the panel together, and worked
9 through the reasonable accommodation process
10 with respect to the commissioner of health's
11 order, I believe, in October, October 20th of
12 2021.

13 Q. And who else was on that team that
14 put the panel together?

15 A. Various individuals. We worked --
16 there were several agencies that worked
17 collaboratively together, and at different
18 stages, different people would weigh in. But
19 it was primarily the New York City Law
20 Department, the New York City Department of
21 Citywide Administrative Services, the New York
22 City Mayor's Office of Labor Relations, as
23 well as the New York City Department of Health
24 and Mental Hygiene, as well as those working
25 in City Hall to coordinate, you know, the

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2 interagency policy issues that were going on
3 with respect to the COVID-19 public health
4 emergency.

5 Q. So were there any other persons from
6 the New York City Law Department that were
7 involved in that process, then, just the
8 putting together of the panel?

9 A. Yes.

10 Q. And who were they?

11 A. Georgia Pestana.

12 Q. And who was involved on behalf of
13 DCAS, the Department of Citywide
14 Administrative Services?

15 A. It varied, but primarily Sanford
16 Cohen, their general counsel, Barbara
17 Dannenberg, who was the Deputy Commissioner of
18 Human Capital, and Stella Xu, she's in an
19 executive role then. I'm sorry, I don't know
20 her precise title. Those were the individuals
21 who were working on employee policy and
22 implementation with respect to the COVID-19
23 emergency, so they were involved in the
24 discussion. And certain also -- at various
25 points we also consulted with Silvia

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E. EICHENHOLTZ

Montalban, who is the Deputy Commissioner for Citywide Equity and Inclusion.

Q. Who was on that group that put together the panel from the Mayor's Office of Labor Relations?

A. It was Renee Campion, the Commissioner of Labor Relations, as well as Steven Banks, who at the time was the first deputy commissioner. They were both involved in the discussions.

Q. And who was involved from the Department of Health and Mental Hygiene?

A. I do not recall at this time. They were -- I don't recall the name of the individual. They were primarily involved when it came to the commissioner's order. I spoke primarily with Lisa Landau, who was their general counsel, but I know that there were doctors and medical policy people who Lisa consulted with as needed. Their involvement was more about the order than it was the reasonable accommodation and appeal process, however. So they were not as involved in discussions about the appeal panel and the

1 E. EICHENHOLTZ

2 appeal -- and the reasonable accommodation
3 process.

4 Q. Okay. And then, you mentioned that
5 there were people who were involved from City
6 Hall in the coordination, I guess, of
7 interagency kinds of policies and that sort of
8 thing. Who were they?

9 A. I'm trying to remember who was --
10 Molly Schaeffer is -- was and remains someone
11 over there who coordinates between the
12 agencies. I don't believe there was anyone
13 directly involved as we were discussing
14 matters of the panel and the composition.
15 That was done primarily discussions between
16 the various agencies. But when we would have
17 our structure set up, we would obviously check
18 in with, it would have been the first deputy
19 mayor's team at City Hall, and the first
20 deputy mayor at the time was Dean Houlihan.

21 Q. Thank you.

22 Now, you've mentioned that Georgia
23 Pestana was also involved from the Law
24 Department. What was her role in that process
25 of the formation of the panel?

1 E. EICHENHOLTZ

2 A. At the time, Georgia Pestana was the
3 Corporation Counsel of the City of New York,
4 so she was serving as the City's chief legal
5 officer. This was obviously a legal
6 compliance issue, so she as well as I were
7 actively involved in that regard.

8 Q. And she is also a person who is
9 representing the City departments in the
10 lawsuit in which you're involved. Is that
11 true?

12 A. No, that's not accurate. As she
13 is -- as Corporation Counsel, when she was
14 Corporation Counsel, she no longer is, she was
15 obviously listed as the primary counsel of
16 record in the same way, you know, a firm's
17 headline would appear in every case. But
18 Ms. Pestana was not personally involved in
19 those representations, outside of an executive
20 and supervisory role.

21 Q. So what was your role in this
22 process of putting the panel together?

23 A. Basically, to be a part of the
24 discussion, to provide my thoughts on what the
25 legal requirements were, the needs were, and

1 E. EICHENHOLTZ

2 how we could go about putting together a
3 structure to satisfy that, what resources the
4 City might have to bring to bear to make sure
5 that we were able to perform those functions
6 well. That was really my involvement in the
7 discussion, as really, quite frankly, was
8 everyone who was involved in that discussion.

9 Q. Now, are you familiar with the
10 standards for adjudicating religious and
11 medical accommodation requests that were set
12 forth in the various decisions that were
13 issued by an arbitrator in the arbitration in
14 the Department of Education that related to
15 religious accommodation requests?

16 A. I'm aware of the arbitration award
17 and generally aware of the process that
18 resulted from that award, yes.

19 Q. And were the standards that were set
20 forth in that process for the decision-making
21 on religious accommodation requests considered
22 by the persons who were involved in the
23 formation of the appeals panel that you formed
24 in late October?

25 A. The citywide vaccine mandate that

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2 we're discussing here, that October 20th
3 mandate, was a different mandate, a different
4 discussion, a different process. And when we
5 were discussing how to put together the panel
6 and the standards that it would apply, that
7 arbitration award was not a consideration, no.

8 Q. Did you discuss it in the course of
9 the formation of the panel, or it simply was
10 never mentioned?

11 A. I -- I don't recall it ever being
12 discussed when it came to how we were going to
13 go about a citywide appeal panel process. Our
14 focus and our discussion was both the legal
15 standards, as well as the City's existing
16 Equal Employment Opportunity, or EEO policy,
17 as well as our Reasonable Accommodation
18 policies, and how we could adapt those
19 policies to effectively address this
20 circumstance in the public health emergency.
21 That was our consideration in designing and
22 discussing the panel.

23 Q. And what adaptations did your group
24 decide it was necessary to make in order to
25 serve those needs?

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2 A. Well, we had received I think two,
3 what I would describe as, broad policy-based,
4 whether you want to call them, requests or
5 considerations for what was desired from
6 policy perspective. What was desired was that
7 this mandate be and the reasonable
8 accommodations be implemented in a uniform
9 manner such that we were not going to have
10 appeals of denials dependent on agency by
11 agency, as well as to have a process that
12 could both, you know, that could handle a
13 large number of appeals that we anticipated
14 would be coming from the agency EEO officer's
15 determinations, so do it uniformly and be able
16 to handle the volume, and of course to do it
17 with effectiveness and proper consideration.
18 Those were really the policy asks.

19 And ultimately, our determination
20 was that we wanted to use -- the City had
21 significant internal resources in many of
22 these agencies that provided a unique
23 perspective based on that agency's work and
24 mission, and that we wanted to bring those
25 resources to bear to create a citywide

1 E. EICHENHOLTZ

2 process, and that's ultimately the process the
3 panel evolved from.

4 Q. Was part of this discussion a desire
5 to have uniform decisions at the agency level,
6 also, as well as at the Citywide Appeals Panel
7 level?

8 A. No. I think the concern was more,
9 you know, the reasonable accommodation --
10 reasonable accommodations were essentially
11 going to be an exception, but an important
12 legal exception to the vaccine mandate, and
13 obviously our focus was on making sure that
14 employees who were denied at the agency level
15 had that opportunity for additional review and
16 to bring that perspective and experience to
17 bear in that review. It is, as it's named,
18 intended to be an appellate review process
19 much like, you know, a court of appeals would
20 be.

21 Q. So in the process of putting this
22 panel together and organizing the City's
23 response to a request for exemptions from the
24 citywide mandate, did your panel discuss or
25 were you personally involved in speaking with

1 E. EICHENHOLTZ

2 the agencies about the processes that they
3 would go through to process their own original
4 reasonable accommodation requests?

5 A. So agencies were -- we had meetings
6 in the lead-up to the implementation of the
7 mandate with, what we call, agency personnel
8 officers, those are your HR leads, as well as
9 EEO officers, where we gave very high-level
10 instructions, as well as answered questions in
11 a group setting. I was involved -- I should
12 also say, we also had meetings with agency
13 general counsel to discuss the legal issues
14 and implications. I was involved in all of
15 those meetings as, you know, as an executive
16 at the Law Department overseeing employment
17 policy and overseeing sort of that legal
18 advice as one of the people who had been
19 paying very close attention to the law and
20 legal developments with respect to vaccine
21 mandates and human resources, employee issues,
22 including, of course, reasonable
23 accommodations.

24 Q. Now, at any time in those
25 discussions with the agencies or in the

1 E. EICHENHOLTZ

2 formation of the panel, did you or anyone else
3 discuss Mayor de Blasio's desires with respect
4 to the implementation of the mandates and with
5 respect to limitation of the number of people
6 who should benefit from them, from the
7 exemptions, or with respect to the limitation
8 with respect to the religions to which they
9 should -- to which they belonged?

10 A. No.

11 Q. No one?

12 A. No. That was not a subject of our
13 discussion, no.

14 Q. Did you talk about Mayor de Blasio's
15 desires at all in those meetings?

16 A. Quite frankly, Mayor de Blasio's
17 desires were irrelevant.

18 Q. And why were they irrelevant?

19 A. Because what we were discussing was
20 a public health order issued by the
21 Commissioner of Health; not the Mayor of the
22 City of New York; a reasonable accommodation
23 process that is mandated by the laws of
24 federal, state, local level, and a citywide
25 policy. And the mayor's opinions on what

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2 should happen there were not relevant to the
3 issue of what was required under the law, what
4 was required under policy, and what the
5 vaccine mandate allowed for.

6 Q. Who else was involved from the
7 people who were putting the panel process
8 together and implementing the RA exception
9 policy in the sort of high-level meetings that
10 you discussed having at the various agencies
11 of the meeting?

12 A. Yeah, the primary -- the actual
13 compensation of the panel primarily was
14 myself, Ms. Pestana, Commissioner Campion,
15 First Deputy Commissioner Banks, in terms of
16 what agencies would serve on it. The nuts and
17 bolts of how the reasonable accommodation
18 process would be implemented, the process of
19 you have X days to appeal and you would get
20 interim accommodation if you timely appealed,
21 those sorts of policy calls were those two
22 agencies, as well as the Department of
23 Citywide Administrative Services.

24 Q. And did the -- was the Department of
25 Citywide Administrative Services involved in

1 E. EICHENHOLTZ

2 the sort of agency-to-agency process that you
3 went through to, you know, make sure that
4 there was some understanding at the high level
5 of those agencies of the processes that were
6 going to be involved and the standards?

7 A. Yes. Actually, DCAS, which is the
8 acronym for that agency, I'll use it so that
9 we can -- we don't need to say the whole term
10 the whole time.

11 Q. I accept that.

12 A. Yeah. DCAS was the one who
13 organized those agency personnel officer and
14 EEO officer meetings and calls. And I would
15 say that they weren't -- yes, those were
16 actually regular calls dealing with pandemic,
17 COVID pandemic and public health emergency
18 related issues that had been ongoing obviously
19 before the health commissioner had issued a
20 vaccine mandate. So they were sort of --
21 those were the topics that were covered in the
22 lead-up to implementation.

23 Q. And those calls were telephone calls
24 or Zoom calls?

25 A. They were -- yeah, I don't remember

1 E. EICHENHOLTZ

2 the medium. It was a virtual video call much
3 like this one.

4 Q. Now, were those conversations of
5 those meetings, were they recorded?

6 A. Not that I'm aware of, no.

7 Q. And why not?

8 A. Because there was no need to. There
9 was no -- there was no need to record it. We
10 had all the agencies in attendance.

11 Q. And could you make an inquiry,
12 please, as to whether or not there are any
13 recordings of those calls?

14 A. Yes, we will do so.

15 Q. Thank you.

16 RQ MR. NELSON: And if there are, we
17 ask that you produce those.

18 MR. HAIDER: We ask that you just
19 put that request in writing. Thank you.

20 Q. Were any documents produced for any
21 of these agency meetings?

22 A. Yes. Those meetings, generally
23 there was a high-level PowerPoint that DCAS
24 prepared with just some basic bullets about
25 what was going on and what agencies needed to

1 E. EICHENHOLTZ

2 do.

3 RQ MR. NELSON: Okay. We are also
4 going to make that document request with
5 respect to that, but I will put it in
6 writing.

7 Q. Now, and what about, how were the
8 meetings set up? Were they set up by email or
9 some other written method?

10 A. DCAS has both on the agency
11 personnel officer and on the EEO officer side
12 contact lists that they maintain, and excuse
13 me, an invitation, I believe, Outlook
14 invitation was sent out to either the APOs,
15 the EEO officers, or both, as the
16 circumstances warranted.

17 Q. Were you personally involved in the
18 drafting of any standards for the individual
19 City agency's consideration of RA requests
20 from employees?

21 A. I'm sort of working on the word
22 "standards" there. I was involved in the
23 drafting of sort of a FAQ policy document. My
24 recollection, it was really more about the
25 nuts and bolts. There was some very

1 E. EICHENHOLTZ

2 high-level guidance, I think, put in there,
3 but it wasn't like this is, you know, how you
4 decide an RA request. I mean, those sorts of
5 documents already existed, you know, in terms
6 of general applicability in the City's various
7 EEO and Reasonable Accommodation policies.

8 Q. So that was an FAQ that was for the
9 Citywide Appeals Panel?

10 A. Not just the Citywide Appeals Panel;
11 it was, as I remember, it was all aspects of
12 implementation of the vaccine mandate,
13 including both reasonable accommodations and
14 the RA process. Obviously the Citywide
15 Appeals Panel is just one phase of the RA
16 process, so it would have been there to the
17 extent we discussed the RA process.

18 Q. Now, are you going to be giving any
19 testimony today which is not from personal
20 knowledge?

21 A. I couldn't tell you at the moment,
22 but obviously as we go along, if you'd like to
23 inquire as to the source of my knowledge on
24 anything, I'd be happy to respond to you.

25 Q. Of course.

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2 Did you review any documents or
3 other, you know, either virtual or physical
4 writings in order to prepare for today's
5 testimony?

6 A. Yes. I reviewed the Complaint in
7 this action, I reviewed four declarations that
8 I prepared over the course of the last six
9 months or so in response to various litigation
10 to describe the Citywide Appeal Panel and its
11 process. I also reviewed the EEOC's --
12 re-reviewed, I should say, I reviewed it many
13 times, the EEOC's guidance on COVID-19, and
14 specifically I believe it's sections K and L
15 which dealt with COVID-19 vaccinations and
16 reasonable accommodation requests.

17 Q. And in order to prepare for today's
18 deposition, did you speak with anyone to
19 obtain information that you needed from them?

20 A. No.

21 Q. Going back to the question I was
22 asking about, your meetings with the agencies
23 to prepare them for their role: In the course
24 of those meetings or afterward concerning the
25 topic of those meetings, were any other

1 E. EICHENHOLTZ

2 documents shared or exchanged, or were there
3 any follow-up emails that were involved with
4 respect to those meetings?

5 A. I'm certain there were. My
6 recollection is the follow-up documents were
7 usually links to the posted FAQ, guidance on
8 various topics that DCAS was preparing for
9 review by agency personnel officers, EEO
10 officers, etcetera. There was no, at least
11 that I can recall, there was never any email
12 or document that said, oh, in addition
13 to what [audio interruption].

14 Q. We've lost you.

15 A. Sorry, yeah, I accidentally pressed
16 the space bar.

17 In addition -- there was no
18 documents of, like, sort of, in addition to
19 the guidance at the meeting, here's additional
20 guidance. It was generally to point people to
21 the resources that were available that were
22 referenced at the meetings.

23 Q. You used the word "generally" there.
24 Specifically, were there any other follow-up
25 emails or documents that you shared or

1 E. EICHENHOLTZ

2 exchanged that refer to other -- that were of
3 another nature or that referred to other
4 materials or contained other discussions than
5 what you just testified?

6 A. None that I can recall.

7 Q. And in the prior -- in affidavits
8 that you've submitted that you referenced, you
9 also mentioned that you had relied upon books
10 and records of the City of New York in the
11 course of preparing them.

12 A. Yes.

13 Q. And can you please, you know, tell
14 us what the nature was of those books and
15 records? Which books, which records?

16 A. Generally, of -- it would generally
17 be, like, things like the FAQ document; it
18 would be, for example, if in a few of them
19 I've had to discuss, like, we've done X number
20 of appeals and Y number of, you know,
21 decisions and we have -- and there were
22 similar documents about the statistics, the
23 number of RAs that had been requested, and I
24 have access to the number of appeals filed
25 with the panel, how many they've decided and

1 E. EICHENHOLTZ

2 the like, I would often consult with those.
3 If it was a specific case, I might review, to
4 understand what the panel's votes were, I
5 might review the panel votes and notes from
6 that case, and that would be a book and
7 record, obviously. So it's those sorts of
8 things that I would be reviewing in
9 preparation of that, of those declarations and
10 affirmations.

11 Q. And are you familiar at this time
12 with the numbers involved with the -- well,
13 I'll ask it in a different way.

14 How many religious accommodation
15 requests were lodged with, you know, putting
16 all of the City agencies together?

17 A. So offhand, I don't know the number
18 of requests. I can tell you the number of
19 requests that made it to appeal, that were
20 filed with either the Citywide Panel -- and
21 this, I should mention, very important, as I
22 mentioned this earlier, but I don't want us to
23 get confused, as you mentioned, the Department
24 of Education was under a separate set of
25 rules, and it is -- while there is mayoral

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2 control in the Department of Education, it is
3 a separate entity for many purposes. So when
4 I talk citywide here, I am excluding the
5 Department of Education, right?

6 So I know that there were roughly
7 about I believe between 6,500 and 7,000
8 appeals filed. I do not know, I'm not privy
9 to the current numbers as to how many total
10 religious reasonable accommodations were
11 requested. I know it approached 10,000, I
12 don't know if it reached there, but I could
13 tell you with respect to those, those are the
14 approximate numbers with respect to religious
15 reasonable accommodation appeals.

16 Q. And so, when you refer to about
17 10,000 requests, that's at the agency level,
18 the initial level, or at some other level?

19 A. That is at the agency level, yes.

20 Q. How many cases have been adjudicated
21 to date by the Citywide Panel?

22 A. To date, it is roughly I believe
23 somewhere around, fully adjudicated, 3,200
24 cases. Partially adjudicated at this point,
25 another 1,015.

1 E. EICHENHOLTZ

2 Q. And what does it mean to be
3 "partially adjudicated"?

4 A. So the panel is composed of three
5 different agencies, so those are cases in
6 which one or two agencies have voted --
7 actually two agencies have voted. If we do
8 one agency, I think we're somewhere around
9 7,000. But there are three agencies. And so,
10 partial adjudications are one of the agencies
11 has reviewed and voted on that case, and one
12 or two agencies has not, so it is not ready
13 for us to issue our final decision.

14 Q. And do you have an estimate as to
15 when all these decisions will be finally
16 adjudicated?

17 A. I -- because I can't really, you
18 know, predict the time it takes for -- I've
19 very much gotten out of the prediction
20 business. We are working as promptly and
21 efficiently as we can, but we also want to
22 make sure we do our review correctly.

23 Q. So is the Citywide Panel created by
24 a regulation or ordinance?

25 A. No.

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2 Q. And why not?

3 A. I think the context that's really
4 important here is that it has two
5 characteristics. One is that it is created in
6 response to a order issued in the context of a
7 public health emergency for which there was a
8 compelling public health reason that there be
9 quick and lawfully compliant implementation.
10 So it was a matter of just creating the
11 structure, advising of the structure. And the
12 other piece is that it is very limited in its
13 scope and function. It is, although we've
14 added on, as you are well aware, several
15 hundred Department of Education appeals, but
16 our primary focus is to hear appeals of the
17 Department of Health mandate that affected
18 existing City employees on October 20, 2021.
19 It's a very limited function in that regard.

20 Q. Sure. Just getting a little more of
21 the statistics involved with the panel's
22 burden, how many cases to date have been
23 denied, requests for religious accommodation?

24 A. I cannot break it out between
25 religious and medical. I don't have access to

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2 those numbers. I can -- I know denials and I
3 know approvals, but I don't know how many of
4 them would be religious or how many of them
5 would be medical.

6 Q. So then how many in total
7 religious -- not religious, I'm sorry.

8 How many in total accommodation
9 requests or appeals have been denied by the
10 Citywide Panel to date?

11 A. First off, with the context that
12 these numbers literally change by the day,
13 obviously --

14 Q. Well, I get it.

15 A. -- we are -- and that's why I'm
16 going to give you a rough number. Were
17 roughly around 3,200 appeals that were denied.

18 Q. And how many were granted?

19 A. Roughly 100.

20 Q. And do you know the statistics with
21 respect to what percentage of the appellants
22 in these appeals had raised religious
23 accommodation requests and what percentage had
24 raised medical accomodation requests?

25 A. It fluctuates as the appeals came

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2 in, but the vast majority were religious. It
3 was somewhere between 80 to 85 percent of
4 appeals were religious reasonable
5 accommodations.

6 Q. And in terms of the grants, do you
7 know the numbers of religious versus medical
8 accommodation cases that were involved, either
9 specifically or at a reasonable estimate?

10 A. As I say, I can't. I don't have
11 that break down. I can tell you a substantial
12 number of our grants were religious reasonable
13 accommodations. Whether it's 85 percent or
14 something -- you know, or somewhere around
15 there, I couldn't say that for certain.

16 Q. Now, 100 as opposed to 3,200, it
17 seems like a small percentage of the appeals
18 were granted. And how do you explain that?

19 A. I think context here is very
20 important. We are not getting every
21 reasonable accommodation request submitted,
22 right? We are getting virtually 100 percent
23 because most people appealed, but every single
24 accommodation we get has already been denied
25 by an EEO officer. Certainly, if we also --

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2 for example, the agencies have the right to
3 appeal a grant of a reasonable accommodation,
4 I'm certain our grant rate would be higher
5 than it is. So you're taking something that's
6 100 percent denial, and it's already been
7 reviewed and information gathered and
8 carefully considered, you would expect that a
9 substantial number -- you'd expect the sort of
10 numbers we have, right? If they were
11 significantly higher than these sorts of
12 numbers, it would be a question as to what the
13 EEO officers were doing or not doing. So
14 it's, you know -- I think of it like an
15 appellate reversal rate. You wouldn't expect
16 appeals courts to reverse even, you know, even
17 a third or a majority of cases. Then
18 something would be wrong.

19 Q. Who has to -- who can provide us
20 with current accurate statistics with respect
21 to the number of grants and denials and the
22 percentages that were religious and medical
23 accommodation matters?

24 A. Well, certainly that data exists. I
25 think the question really would be how we

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2 would go about cutting it in the way you'd
3 want to cut it there, because it is not -- at
4 least I do not have access to data cut in that
5 particular way.

6 Q. And who in your organization would
7 be the person who would be performing that
8 function?

9 A. Well, is this in regard to appeals,
10 or is this in regard to reasonable
11 accommodations overall?

12 Q. With respect to appeals.

13 A. With respect to appeals, generally
14 we would -- it wouldn't necessarily be a
15 person. We would generate a report from the
16 system we are using to facilitate the appeal
17 process, the database system we're using.

18 Q. And who would be able to provide
19 that information with respect to all
20 accommodation requests?

21 A. We have -- the Department of
22 Information Technology and Telecommunications
23 would do it, host the database, I believe they
24 have a vendor working with them, and we would
25 put the request in to that vendor, and the

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2 vendor would run the reports, as we needed it.

3 Q. Now, is the Citywide Appeals Panel
4 within the organizational structure of any of
5 the departments or agencies or other organized
6 entities that are a part of the City?

7 A. No, it's -- I view it, and I think
8 structurally it is sort of a collaboration
9 between the agencies that vote, and there
10 are -- when it comes to citywide personnel
11 policy and various citywide matters, there are
12 agencies that oversee various, you know,
13 aspects of that. So the Law Department
14 obviously is the City's legal oversight. The
15 Department of Citywide Administrative Services
16 is personnel, EEO policy oversight. So those
17 agencies basically have responsibility to make
18 sure this is implemented properly. The panel
19 itself essentially steps into the shoes of the
20 agency head of the various City agencies who,
21 under the City's EEO policy, would ordinarily
22 decide the appeal of a reasonable
23 accommodation request.

24 Q. So, I'm sorry, but I don't
25 understand that answer at all.

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2 A. Okay. I'll try and explain it. If
3 you ask me a clarifying question, I would be
4 happy to clarify.

5 Q. So, first of all, who's in charge of
6 the Citywide Appeals Panel?

7 A. As I said, it's collaborative.
8 Obviously, I've been doing, as the Law
9 Department representative, I've been doing a
10 lot of the work in organizing the meetings and
11 moving the panel process forward. I have
12 worked with Sanford Cohen, who is the general
13 counsel at DCAS, who is also working with me
14 on sort of oversight and quality control work
15 on the process. And other than that, it is a
16 collaborative effort of the various agencies,
17 and particularly the panel members, to move
18 the appeals process forward. So, you know, I,
19 as well as Mr. Cohen will review the stats,
20 the cases, we'll confirm when the cases are
21 ready to go out, things like that, and move
22 the process forward in that administrative
23 respect.

24 Q. So is no one, then, in charge of the
25 Citywide Appeals Panel?

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2 A. No one individual? No, there's no
3 one individual in charge of the Citywide
4 Appeals Panel. We obviously report to our
5 respective agency heads, but there is -- and
6 obviously, there's a mandate and a directive
7 that we do our work. But we all report, with
8 respect to our work, to our respective
9 supervisors at the agency. So with respect to
10 my work in the panel, I would report to the
11 Corporation Counsel of the City of New York,
12 and Mr. Cohen would report to the Commissioner
13 of the Department of Citywide Administrative
14 Services.

15 Q. So your personal authority is
16 limited to the work that is performed by the
17 members from the Law Department, and Mr. Cohen
18 has authority over the persons who come from
19 DCAS, and other administrative heads have
20 authority over the CCHR, you know, component?
21 Is that your testimony?

22 A. Yes. And in terms of
23 process-related questions and decisions, we'll
24 discuss them collaboratively at the various
25 agencies. So there's never been a need sort

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2 of to have one final decision-maker in the
3 process. You know, again, we function the way
4 I envision it, we function very much like an
5 appellate court. And while there is a chief
6 judge who has an administrative role, all the
7 judges have both the authority and discretion
8 to review cases and exercise their -- that
9 level of discretion as they see appropriate,
10 given the mandate and the constraints of the
11 law and the policies we're talking about.

12 Q. So you would oversee and give
13 quality control with respect to the decisions
14 that are -- votes that are made by members of
15 the Law Department?

16 A. Oh, okay, now I understand where the
17 confusion is.

18 No, I will -- Mr. Cohen and I have
19 an additional oversight role where we will
20 review every case after all three votes are in
21 for administrative and quality control
22 purposes, and basically confirm they are ready
23 to go out and, you know, they're in regular
24 form and order and things like that.

25 Q. And so, you personally have reviewed

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2 every case that has gone out with a grant or a
3 denial of an appeal?

4 A. Well, in the oversight role, I
5 review half of them; Mr. Cohen reviews half of
6 them?

7 Q. So when you have done that, on the
8 average, how much time have you spent on each
9 case?

10 A. In the oversight role or in
11 reviewing and deciding a case? I just want --

12 Q. In the oversight role.

13 A. In the oversight role, it doesn't
14 take very much time. Sometimes, you know, a
15 minute or two. What you're doing in the
16 oversight role is just making sure that the
17 votes and the comments are in order, assigning
18 a decision code and confirming the case is
19 ready to be sent out. So it doesn't --
20 doesn't take very long at all.

21 Q. So do you review the substance of
22 the work that is done by the persons who cast
23 the votes?

24 A. No. The people responsible for the
25 substance of that review are the individuals.

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2 The review of that work -- so if I see, for
3 example, a decision or a vote that I
4 personally might disagree with, given the
5 facts and circumstances of the case, that's
6 not my function in the oversight role to say,
7 hey, I wouldn't vote the way you voted in this
8 case. My job is to make sure that the
9 agencies voted, the agency reps voted, and
10 that their votes are properly recorded and
11 that we are, you know, properly sending out
12 the case as a denial or an affirmance and that
13 that's accurate. It's more of an
14 administrative, ministerial role at that
15 stage.

16 Q. What does that --

17 A. To be clear, if there was some
18 substantive issue I would flag, I would speak
19 with the panel member and say, for example,
20 and this has happened on occasion, you know,
21 their notes don't seem to match their vote.
22 So, you know, you see a rejection and the
23 notes suggest that they're approving, I would
24 go back to that panel member and say, please
25 review this to confirm it's accurate before we

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2 send it out. But I wouldn't, like, say, oh, I
3 think you meant to do what you said in your
4 comments, or I think you meant to do what you
5 said in the vote. That's up for them to
6 review and to confirm whether it's accurate or
7 not.

8 Q. What if the vote or the comment that
9 supported the vote was purely inconsistent
10 with the evidence of the case? Would you flag
11 that?

12 A. Generally, I'm not doing that level
13 of review because that is the function of the
14 three agency voters on any given appeal. I
15 am -- you know, and I perform that function,
16 as you're aware, in many cases. But it is
17 their job to review the evidence and to make a
18 determination based on their review of the
19 evidence and the record that's been presented
20 to us.

21 Q. Mr. Eichenholtz, just stepping aside
22 for a second, at times it looks as if you are
23 reading something when we are -- when you're
24 answering a question, and I'm wondering, are
25 you reading something as you answer these

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2 questions, or have you been? And have you
3 been typing notes to anybody?

4 A. Absolutely not. I think what you
5 are seeing is the camera is oriented higher
6 than my face. I'm looking at the screen, not
7 the camera, so the angle of the camera has my
8 eyes looking at the computer screen. I'm
9 actually looking right at you, Mr. Nelson,
10 when you're asking questions, and I have my
11 Zoom in gallery view, so you're sort of off to
12 the right-hand, top corner of my screen.

13 Q. Thank you for that explanation.

14 A. No problem.

15 Q. You mentioned also that the panel is
16 reviewing DOE denials as a result of the
17 second circuit decision. And have you been
18 reviewing them with the same appellate style
19 review that you described, taking into account
20 the fact that all of those cases were denied
21 prior to coming to the Citywide Appeals Panel?

22 A. Those cases were -- what we've done
23 in those cases, there was a slightly different
24 approach. When we got those cases -- and when
25 I say "those cases" right now, I'm talking

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2 about the first 14 named plaintiffs which we
3 were assigned following decision of the second
4 circuit. You know, it was clear to us that
5 what the DOE and the award there had done did
6 not exactly mimic what the agencies had done.
7 But we reached out both to the employees and
8 to the Department of Education to get more
9 information about the nature of their appeals
10 to try and make sure that the records were
11 more fulsome. So the employees -- those 14,
12 the employees were asked a series of questions
13 about their requests to give us some more
14 information. Sometimes it duplicated material
15 they had already provided the arbitrator,
16 sometimes it did not. And the Department of
17 Education was asked to give more information
18 about why they were denying the request. We
19 reviewed that record so that we could do more
20 of an appellate style review.

21 Q. Now, with respect to the information
22 you got in that process from the DOE, did you
23 provide that information to the appellants?

24 A. No.

25 Q. Why not?

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2 A. Because the purpose of obtaining
3 that information was to allow the panel to
4 understand the relevant facts of the case.

5 Q. Would it not have been useful to the
6 appeals panel to also understand or to receive
7 the point of view of the plaintiffs with
8 respect to the accuracy or completeness or,
9 you know, correct interpretation of the
10 material that the Department of Education was
11 providing?

12 A. Yes.

13 MR. HAIDER: Objection.

14 THE WITNESS: Thank you. Sorry
15 about that.

16 A. Yes, and that is why we made inquiry
17 of the individuals.

18 Q. So you made inquiry of the
19 individuals after you received materials from
20 the DOE?

21 A. No, we made inquiry from both
22 parties.

23 Q. So did you examine whether or not
24 due process required you to get input from the
25 plaintiffs with respect to the information

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that's being provided to you by the DOE?

DI MR. HAIDER: Objection. Objection.

This question appears to be outside the scope of the order here. We're at -- we're getting into legal questions with respect to the DOE appeals, specifically. This is not within the scope of the Citywide Panel's process of reviewing or the standards that it applies.

So I'm going to instruct my witness to not answer -- the witness to not answer this question.

Q. So how did the process that the panel followed with respect to the other DOE employees, some -- at least one or two of which are involved in the instant lawsuit, differ, if it did differ in any way, from the treatment that the panel gave to the 14 from the Kane and Kyle lawsuit?

A. So other than that a lot of those inquiries became a more standard part of the process, and I think it was gathered by the DOE and sent to the panel rather than the panel needing to reach back out to everyone

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2 and say, please do this. That was a
3 significant difference.

4 Q. So the DOE provided additional
5 information with respect to those persons?

6 A. Yes, both on behalf of the DOE and
7 based on information they collected from those
8 persons.

9 Q. And those persons were not
10 confronted with that information or given an
11 opportunity to rebut it?

12 A. Confronted in what way?

13 Q. Well, did you send the information
14 that you had received from the DOE to the
15 other appellants from the DOE to get their
16 comments?

17 A. No. This isn't a litigation, you
18 know, an adversarial litigation. It's a
19 cooperative dialogue, it's a reasonable
20 accommodation process.

21 Q. So if it's a dialogue, did you reach
22 out orally or in some other way to the
23 appellants to get their views with respect to
24 the information you received from DOE?

25 A. So just to be -- we're talking about

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2 the 500-and-so DOE individuals who were doing
3 their -- they're having essentially the review
4 of the earlier denial from the arbitration
5 ordered by the panel? That's what we're
6 talking about here?

7 Q. I don't think you captured it quite
8 correctly.

9 A. Okay. I want to hear from you
10 what -- because I want to make sure I'm
11 accurate.

12 Q. So in tandem with the Second
13 Circuit's order sending the 14 Kyle and Kane
14 plaintiffs to the Citywide Appeals Panel, the
15 Law Department agreed that access to the
16 Citywide Appeals Panel would also be provided
17 to those persons who not only went through the
18 initial stage, but also filed an appeal and
19 were denied in the DOE reasonable
20 accommodation process.

21 A. Uh-huh.

22 Q. So with respect to those add-on
23 persons, the persons who were not plaintiffs,
24 not named plaintiffs in the other litigation,
25 did the Citywide Appeals Panel engage in a

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2 dialogue with them with respect to the
3 information that the panel received from the
4 DOE?

5 A. The Citywide Appeals Panel reviewed
6 the appellate record that it was provided by
7 the DOE with the information from the DOE and
8 from the employee.

9 Q. But you'd indicated that the DOE
10 also was provided additional information that
11 had not been a part of the proceeding below?

12 A. Right. Not -- general -- not
13 always, but yes, they had the opportunity to
14 do so.

15 Q. And did the panel members engage any
16 kind of a dialogue, whether written or oral,
17 with the other 500 or so appellants from the
18 DOE?

19 A. Yes, we received responses to
20 queries in writing that the DOE gathered.
21 What follow up the DOE did or did not do, I
22 could not tell you before providing the
23 records to us on the panel.

24 Q. So I'm not understanding. I thought
25 that you had said that the panel engaged in a

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2 dialogue; not the DOE engaging in a dialogue
3 with the appellants.

4 MR. HAIDER: Objection.

5 Q. So I'm asking you to clarify this.

6 A. Okay. So what I said was, a
7 reasonable accommodation is a cooperative
8 dialogue; it is not an adversarial process.
9 So I would not ordinarily -- it is not a
10 standard part of a reasonable accommodation
11 cooperative dialogue to have, you know --
12 generally, the person gathering the facts will
13 speak with the employee, will gauge the needs
14 of the employer, and reach a determination.
15 It's not like this, you know, confrontational
16 back and forth, and that's what you were
17 describing, so that's what I was trying to
18 express there. And I was really talking more
19 about the information-gathering stage, which,
20 as I said, is generally the agency level. And
21 with respect to DOE employees, we were asking
22 DOE to query their employees to gather that
23 information so that we had as full a record as
24 possible for our review.

25 Q. Okay. With respect to appellants

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2 who are not from the DOE, did the Citywide
3 Appeals Panel reach out to any of them to
4 obtain information that was not in the record
5 below?

6 A. So I'm going to say, because I
7 think -- so the panel will ask the agency to
8 do that. Again, the panel is performing an
9 appellate function, and so if we believe
10 additional cooperative dialogue is necessary,
11 we would essentially, in essence, remand to
12 the agency for cooperative dialogue, which
13 means we will send, and any one panel member
14 can request this, a request that the agency
15 engage the employee in a specific way with a
16 specific question or a specific issue. The
17 employee would then have that dialogue and
18 then report back to the panel, generally
19 upload any documentation of that exchange for
20 our review so that we can consider it when
21 rendering a final decision on the appeal.

22 Q. And in how many cases did any panel
23 engage in making that request and sending the
24 matter back on rematch of the agency?

25 A. Hundreds.

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2 Q. I'm sorry?

3 A. Hundreds.

4 Q. Hundreds. Okay.

5 MR. HAIDER: Mr. Nelson, just could
6 we take a ten-minute break at this point?

7 MR. NELSON: That's fine, sure.

8 Thank you. We'll reconvene in ten
9 minutes.

10 THE VIDEOGRAPHER: We're now going
11 off the record. The time is 10:14.

12 (Recess was taken.)

13 THE VIDEOGRAPHER: Back on, the time
14 is 10:25.

15 BY MR. NELSON:

16 Q. So welcome back, Mr. Eichenholtz.

17 A. Thank you.

18 Q. So we were just talking about
19 contrasting the DOE people who were not in the
20 Kane/Kyle named plaintiffs and those other 14
21 people. And there's a series of concepts with
22 which I'm absolutely certain you're familiar,
23 as an experienced lawyer, with respect to the
24 appellate review standards that are not the
25 kind of standards we're talking about in

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2 terms, you know, of how do you get a religious
3 accommodation, but rather, what approach does
4 the person who is deciding a case on appeal
5 take toward the decision below. So for
6 example there, there is an abuse of discretion
7 standard which is used in some kinds of cases.
8 There is a de novo standard which is used in
9 other kinds of cases. And there's a range of
10 other sort of intermediate kinds of standards.

11 So what appellate review standard
12 does the Citywide Appeals Panel utilize in
13 its -- in the cases that are not the Kane/Kyle
14 cases?

15 A. It uses -- yeah, and I agree with
16 you, Mr. Nelson, you can't exactly get
17 precisely the same analogy, but it is akin to
18 a de novo standard. We are reviewing and
19 doing sort of an independent and open-minded
20 review of the record, mindful of the agency's
21 grounds, excuse me, for denying the reasonable
22 accommodation that we're seeing on appeal.

23 Q. And so, how much consideration --
24 sorry. Strike that question.

25 And why is it -- I mean, can you

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2 explain why on a de novo standard only
3 100 cases would have been granted out of the
4 more than 3,000 before you to decide or --

5 MR. HAIDER: Objection.

6 Q. -- not quite that many? Just to see
7 if I got the numbers --

8 A. Right. I refer you to my earlier
9 answer. 100 percent of the cases the panel
10 sees was -- were denied after a conscientious
11 review by a trained EEO professional. I would
12 not imagine a much more significant amount of
13 reversals there because we, in the City of New
14 York, train our EEO officers and our
15 Disability Rights Coordinators and the various
16 personnel who review reasonable accommodation
17 requests how to do it. So if they're reaching
18 a conclusion of denial, generally there is a
19 basis for that; obviously not in every case,
20 but generally there is.

21 Q. Now, in some of the cases that were
22 decided at the agency level, the agency
23 instructions gave two options to the employees
24 who were asking for accommodations. They have
25 an option to go to an arbitration using the

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2 arbitration standards that were referenced in
3 Kane and Kyle, and they had an option to go to
4 the appeals panel. So did the appeals panel
5 review any of the cases that were decided by
6 arbitrators outside of the Kane/Kyle cases?

7 A. And when you say "the Kane/Kyle
8 cases," again, I don't want us to get
9 confused, you're talking about the 14
10 plaintiffs or the additional 500-and-so that
11 the panel reviewed? You're talking about that
12 whole universe when you say "the Kane/Kyle
13 cases," or are you talking about the 14?

14 Q. In this question, yes, the whole
15 universe.

16 A. The whole universe. So outside the
17 whole universe of those cases -- I hate to do
18 this, Mr. Nelson, I'm sorry, what was the
19 question? I lost it. I'm trying to figure
20 out what universe we were talking about.

21 Q. Understood.

22 So in some of the cases from many of
23 the agencies, the employees are given the
24 option either to go through an arbitral
25 proceeding using the Kane/Kyle standards, that

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2 is to say the arbitral standards on the one
3 hand, or they were given an option to pursue
4 an appeal to the Citywide Appeals Panel. So
5 outside of the people from the Department of
6 Education, did the appeals panel consider any
7 appeals from decisions that had been rendered
8 by an arbitrator under the arbitral process?

9 MR. HAIDER: Objection.

10 A. Yeah, and that's not quite how they
11 worked on the non-DOE basis. The arbitral
12 process was not, even though it was the
13 same -- there were arbitrators that made that,
14 the arbitrators were essentially the option
15 for appeal. In all cases with respect to the
16 October 20, 2021 Commissioner of Health order
17 that concerned City employees, the agency made
18 a determination in the first instance. So you
19 didn't -- you know, you couldn't skip the
20 agency level by going to arbitration. It's
21 when you were denied by the agency and you
22 were covered by a union that had reached an
23 arbitration agreement through collective
24 bargaining, you could appeal to an arbitrator
25 rather than the Citywide Panel.

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2 Q. And so, you're saying that after the
3 arbitrator decided, there was no further
4 recourse to the Citywide Appeals Panel for
5 those people?

6 A. No, no, no, no, you had to decide
7 after it was denied which path you wanted to
8 take, whether you wanted to appeal to the
9 Citywide Appeals Panel or whether you wanted
10 to appeal to the arbitrator. The arbitrator,
11 arbitration by its definition is binding.
12 There was no appeal after the arbitrator back
13 to the Citywide Appeals Panel. So it was, you
14 know, it ended with the -- that path ends with
15 the arbitrator.

16 Q. Now, the DOE people who -- the 500,
17 let's say that number which is an estimate for
18 all the people who are named plaintiffs in the
19 Kane/Kyle matter, all of those 500 had had
20 their denials below adjudicated under a set of
21 standards that the second circuit had found to
22 be faulty.

23 A. Correct.

24 MR. HAIDER: Objection.

25 A. Correct.

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2 MR. NELSON: Just as a predicate for
3 the question I'm about to ask, Mr. Haider.
4 I think I understand your objection
5 though.

6 Q. So did the Citywide Appeals Panel
7 treat the record below or the decisions that
8 were made below in respect of those 500 or so
9 DOE employees any differently than it treated
10 the appeals from the other City agencies?

11 A. No. That was -- the whole point was
12 our, function when we got those cases was to
13 look at the record and review and resolve them
14 under the standards set forth by Title VII,
15 the State Human Rights Law and the City Human
16 Rights Law, rather than whatever standard had
17 been set forth in the arbitration process that
18 the arbitrators used. It was precisely to
19 give that fresh look, and we understood that,
20 and we did not take into account any standard
21 or qualification or whatever you want to
22 characterize it as that was present at the
23 arbitration stage of the process.

24 Q. So you were -- Citywide Appeal Panel
25 members, then, did not take into account the

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2 fact that the standards that had been applied
3 below to DOE cases were [inaudible]?

4 MR. HAIDER: Objection.

5 A. I don't -- we didn't -- we -- we
6 were -- we reviewed it as if we were getting
7 the record from the agency and we were making
8 the appellate determination; that the agency
9 was denying the request and that we were
10 making the appellate determination of whether
11 or not the agency was right to deny it. And
12 we applied the same standard in those cases
13 that we applied to all of the other appeals
14 that we reviewed.

15 Q. Were the individual members of the
16 Citywide Appeals Panel who were adjudicating
17 DOE cases given any information about the
18 different standards that had been employed
19 below in the DOE religious accommodation
20 determinations than had been applied below to
21 accommodation requests made to the other
22 agencies?

23 MR. HAIDER: Objection. And I just
24 want to note as to the form, the use of
25 the word "below" here, are we referring to

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2 the agency or the arbitration?

3 MR. NELSON: So you know what? I'm
4 going to rephrase that question.

5 THE WITNESS: Okay.

6 MR. NELSON: So I withdraw it.

7 Q. At the agency level, which in terms
8 of an appeal, I would characterize sometimes
9 as being the level below, at the agency level,
10 were the initial decisions being made on the
11 basis of the arbitral standards or on some
12 other basis?

13 A. On the basis, as I understand it, of
14 the Title VII standards, and that was one of
15 the reasons we asked the Department of
16 Education to advise us what their basis for
17 denial was, because it could not and would not
18 be that the arbitrator had previously denied
19 the case.

20 Q. And in the conversations that you
21 had with agencies prior to their making
22 initial decisions with respect to the
23 religious accommodation requests, did you
24 instruct them with respect to the Title VII
25 standards?

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2 A. In the sense that -- and when I say
3 "you," by the way, I'm going to be a little
4 more generic here. I don't know if the words
5 came out of my mouth or someone else's mouth.
6 We pointed the agency officers to the EEOC
7 Guidance that existed, as well as the FAQs
8 that DCAS had prepared. Those were their
9 resources.

10 Again, I think it's important to
11 remember that the crowd we're talking to are
12 people who are EEO professionals, who do this
13 for a living, who are trained in reasonable
14 accommodation and adjudicative processes and
15 other related staff who are under the
16 supervision and instruction of those
17 individuals. So it was not really necessary
18 to sort of give a Reasonable Accommodation 101
19 to the group. It was sort of to say, here's
20 sort of how the standard is being -- here's
21 the guidance for how to apply the standard in
22 the context of COVID-19 vaccination.

23 Q. Do you have any records of the
24 meetings in which these instructions with
25 respect to Title VII or other standards were

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2 being given to agency personnel, you know, in
3 connection with the formation of this citywide
4 appeals process and RA process for COVID-19?

5 A. That was --

6 MR. HAIDER: Objection.

7 A. Yeah, that was the FAQ I was
8 describing. And I -- it's challenging for me,
9 I will say, just generally because, again, I
10 hear you severing off the Citywide Appeals
11 Panel. I'll say it again: The Citywide
12 Appeals Panel is the appellate stage of a
13 broader process. We did not at any point,
14 that I can recall, focus EEO officers,
15 agencies on the appeal panel in its process.
16 But overall, the overall process and how it
17 was going to work mechanically was what was
18 being discussed.

19 Q. And did you discuss routinely with
20 the agency personnel, with whom you were
21 discussing the first stage of this process,
22 the heightened standards that are provided in
23 the New York State and New York City Human
24 Rights Laws for the determination of religious
25 accommodation requests?

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2 MR. HAIDER: Objection.

3 A. We were following the guidance of
4 those agencies. They had, in the context of
5 this public health emergency, being, adopting
6 the guidance provided by the EEOC. But the
7 City's EEO policy, obviously since the City
8 Human Rights Law is our law, makes great note
9 of the different standards and things like
10 that. But in terms of the guidance of the
11 application with respect to COVID-19
12 vaccination, my understanding is that both at
13 the state and city level was that they were
14 adopting the policy guidance provided by the
15 United States Equal Employment Opportunity
16 Commission.

17 Q. And how did you learn that?

18 A. In conversations with the agencies,
19 and I believe they had posted that guidance
20 publicly at various stages, but I don't
21 recall, specifically.

22 Q. And is it your understanding that
23 the New York State and New York City Human
24 Rights Laws were altered or modified in some
25 way with respect to the way in which undue

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2 hardship for the agency had to be determined?

3 A. Not that I'm aware of.

4 Q. So the way the law is written is the
5 way that it should have been applied. You
6 would agree with that?

7 A. Well, I think the City Commission on
8 Human Rights, in discussing how to apply it in
9 this context, you know, was referring back to
10 the EEOC. But yes, I mean, the law as it's
11 written applied. There was no suspension of
12 the law or anything like that.

13 Q. So with whom did you have
14 discussions about these questions in the New
15 York City Human Rights Law Department?

16 A. What's the New York City Human
17 Rights -- I'm not familiar with that.

18 Q. You're not familiar with the New
19 York City Human Rights Law?

20 A. I'm familiar with the New York City
21 Human Rights Law. You're asking if I had
22 conversations with the law. I don't know
23 what you mean.

24 Q. I used the word department, I'm
25 sorry.

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2 Did you have discussions concerning
3 the way that the New York City Human Rights
4 Law ought to be applied consistent with the
5 equal opportunity law of the federal
6 government, did you have those conversations
7 with people from the City Commission on Human
8 Rights or other human rights officials with
9 the City?

10 A. Yeah, I'm certain either directly or
11 indirectly. I either directly had a
12 conversation or I was advised indirectly that
13 the commission had been consulted at some
14 phase by DCAS or some other agency. I could
15 not tell you, as I sit here today, how that
16 came about.

17 Q. And can you identify any individuals
18 with whom you spoke from those human rights
19 departments of the City?

20 A. On that topic, no, I could not, as I
21 sit here today, tell you I spoke with this
22 specific person or that specific person.

23 Q. But your understanding with respect
24 to how the Citywide Appeals Panel ought to
25 decide issues of undue burden, after

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2 conversation with those persons from the
3 City's human rights departments, what was your
4 understanding that you had after those
5 conversations?

6 MR. HAIDER: Objection.

7 A. Again, that we would follow the EEOC
8 Guidance with respect to specific
9 applicability of the COVID-19 vaccine mandate,
10 that we still, in the City, had an EEO policy
11 and reasonable accommodation guidance that was
12 generally applicable. That was always my
13 understanding. It remains my understanding to
14 this day.

15 Q. So with respect to the issue of
16 undue hardship, what did you understand the
17 EEOC Guidance to be in the context with
18 COVID-19?

19 A. Well, I understood that in order --
20 I view undue -- generally, I would expect that
21 if -- undue hardship is something that the
22 employer will raise in the context of a
23 reasonable accommodation request if it
24 determines that there is some greater than
25 de minimus burden on the agency's operations

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that would articulate in some manner that would prevent it from granting a religious reasonable accommodation. In a nutshell, that's my understanding.

Q. So was it your understanding that the agency did not have to show a significant hardship or burden --

A. Yes.

MR. HAIDER: Objection.

Q. -- from the granting of an individual's religious accommodation request?

DI MR. HAIDER: Objection. I'd just note that this question is directing the witness' understanding rather than the Citywide Panel's standards and process. It's outside the scope.

So I would direct the witness to not answer the question as to his understanding.

Q. Okay. I'll ask the same question with respect to what standard the Citywide Appeals Panel was expected to apply.

A. And I don't have the precise letter and number in front of me, but it is -- there

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2 is a discussion of undue burden with respect
3 to religious reasonable accommodations and the
4 COVID-19 vaccination in the EEOC Guidance, and
5 they were instructed to both review, apply,
6 and follow that guidance, the specific request
7 of vaccination exemption reasonable
8 accommodation request.

9 Q. And with respect to the level of
10 burden that the agency needed to show, was it
11 something simply greater than the de minimus
12 or was it a substantial burden?

13 MR. HAIDER: Objection.

14 A. As I sit here today, I don't
15 remember the precise words; I don't remember
16 if it was substantial appears or not. I do
17 not want to create a greater or lesser burden
18 than what the EEOC Guidance says by saying one
19 word or omitting a word. Obviously, there had
20 to be some substance to the burden, whether
21 there was a legal term of art of substantial
22 or something in that regard. As I sit here
23 today, it needed to be something and we needed
24 to see a, you know -- some sort of burden that
25 they were articulating and to evaluate whether

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2 it was of substance, which we've done. I
3 don't remember if the word "substantial" is in
4 that. And again, I don't want to put words
5 that don't exist or remove words that do
6 exist.

7 Q. So did you ever have any discussions
8 with or exchanges of correspondence with
9 individual panel members in which you
10 discussed the amount of burden that an agency
11 might be required to show?

12 MR. HAIDER: Objection.

13 A. I know in our regular check-ins, we
14 had discussed some issues with substantial --
15 with undue burdens -- no, substantial -- undue
16 burden and evaluating them in the context of
17 the various agencies that were making that
18 argument. We had discussions, certainly, that
19 some agencies were not making that argument
20 and that we were proceeding to evaluate based
21 on, you know, the information the agencies
22 were giving us. You know, but I can't tell
23 you specifically, like, that category, this
24 was said about that category. We had general
25 discussions about undue hardship claims in

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2 appeals during our check-ins.

3 Q. I'll take just a moment of silence
4 while I find out where I am in my outline --

5 A. Sure.

6 Q. 30-second-or-so delay that we're
7 going to have here.

8 Did you ever discuss this issue of
9 how to evaluate undue burden in any emails
10 with individual panel numbers or with all the
11 membership of the Citywide Panel?

12 A. No. It would have been at our
13 weekly check-ins we were discussing it.

14 Q. And were your weekly check-ins
15 recorded in any manner?

16 A. No.

17 Q. And why not?

18 MR. HAIDER: Objection.

19 A. Again, because the panel members
20 were there and were participating in the
21 discussion, and there was no identified need
22 to go back and review those discussions
23 afterward.

24 Q. You spoke of "weekly check-ins."
25 And did you have a check-in weekly with

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2 respect to the work with the Citywide Appeal
3 Panel?

4 A. Yes. It was weekly until roughly
5 early to mid March.

6 Q. And who participated in these
7 check-ins?

8 A. All the members of the Citywide
9 Appeal Panel, so all the people who were
10 reviewing and voting on cases.

11 Q. And these check-ins took place by
12 Zoom?

13 A. Like I said, a videoconference. I
14 can't recall at the moment whether it was
15 Zoom. It may have been Microsoft Teams.

16 Q. And were these conferences recorded?

17 A. No.

18 Q. And were notes taken?

19 A. No.

20 Q. And why not?

21 MR. HAIDER: Objection.

22 A. Again, as I mentioned a few moments
23 ago, these check-ins were meant to be somewhat
24 informal opportunities for the panel members
25 to confer, to discuss any questions, concerned

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2 trends they had. I also would often review
3 our progress in deciding cases, go through
4 some of the metrics and statistics.

5 The purpose of it really was to
6 bring the group together because a lot of the
7 cases -- obviously the cases, because we want
8 each panel member and each agency to bring
9 their own unique perspective, when they're
10 reviewing cases, they're reviewing them
11 individually. So we wanted to have these
12 opportunities for everyone collectively, you
13 know, to share announcements, you know,
14 important developments, and to have the
15 opportunity to talk at a higher level about
16 various issues.

17 Q. And among the things that you did in
18 these weekly check-ins, did you discuss how to
19 adjudicate cases in, you know, various kinds
20 of situations that had been presented in
21 individual applications?

22 A. So generally, it wasn't one -- like,
23 in this individual case, you know, I
24 encountered this. It was more about trends
25 and issues that people had encountered and may

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2 have said, hey, I wanted to see what you all
3 thought, here is my thought process when I
4 encountered this issue. And we'd have
5 conversations, respectful of the fact, as I
6 said, that everyone is entitled to their own
7 independent opinion and judgment on the
8 application of the [inaudible] fact and the
9 assessment of credibility, things like that.
10 So we would have those sorts of higher-level
11 conversations.

12 Generally, the conversations about
13 specific cases were more procedural; I would
14 like more information on this issue or, you
15 know, from the agency, I would like more
16 cooperative dialogue on this; there seems to
17 be a missing document in this case, can you --
18 you know, someone follow up with the agency
19 and see what it is, more so than a discussion
20 of the individual panel member's assessment of
21 the merits of the appeal.

22 Q. Were there also situations in which
23 the three persons who were assigned to vote on
24 a particular case, you know, spoke to each
25 other?

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2 A. Yes, that's happened.

3 Q. And how frequent is that?

4 A. That's rare.

5 Q. Okay. And what about engaging in
6 email communication?

7 A. We will on occasion engage in email
8 communication, as well as, you know, Microsoft
9 Teams, we will send a message to the group.
10 You can do that, there's a function in Teams
11 that does that. Our protocol is that when we
12 do so about a specific case, we include the
13 case number so that we can identify later on
14 if it's relevant to any inquiry that we
15 received, whether it's litigation related,
16 what have you, we can identify those
17 communications easily.

18 Q. You used the word "protocol."

19 A. Uh-huh.

20 Q. Are there any protocols that are in
21 writing that are, you know, established by
22 your Citywide Appeals Panel?

23 A. No. As I've said, and I think I've
24 been, you know, as direct as I can about it,
25 this was a process developed in the context of

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2 a public health emergency. I can see in an
3 ideal world where we were spending months or
4 even years building it up and preparing it,
5 there would be manuals, protocols, you know,
6 rules and regs. That's not how this went.

7 This was something where we had to
8 build the foundation off of the structure, you
9 know, make sure we're firm on the standards,
10 and then as we went along, as we encountered
11 things, we would discuss as a panel, you know,
12 we should do this in this situation or that.
13 In that situation, one of the things that
14 developed early on was that we generally were
15 working out of our database, but there were
16 times where we needed to communicate outside
17 the database and wanted to make sure those
18 communications were assessable, should we ever
19 need them moving forward.

20 Q. What database are you using? What
21 database program?

22 A. Yeah, sure. It's called Salesforce.

23 Q. Salesforce?

24 A. Yes.

25 Q. Now, in one of your affidavits,

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2 Mr. Eichenholtz, you used the word
3 "guidelines," and you applied it to consist of
4 two documents that you specifically
5 referenced. One was the FAQ on New York City
6 Employees Vaccine Mandate, and you've already
7 referred to that document in this deposition,
8 and we could call it the FAQ. And the other
9 was applying for a reasonable accommodation
10 from the COVID-19 vaccine mandate.

11 A. Uh-huh.

12 Q. You indicated that you had been at
13 least one of the people involved in drafting
14 the FAQ.

15 A. Yes, yes.

16 Q. And who else participated in that
17 drafting?

18 MR. HAIDER: Objection.

19 A. Yeah, and like I said, I can tell
20 you the agencies rather than the individuals.
21 It would have been DCAS and OLR, the Native's
22 Office of Labor Relations would have been
23 involved in those drafts.

24 Q. And so, they were also involved in
25 the applying for a reasonable accommodation

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2 document?

3 A. Yes.

4 Q. And you were involved in that, also?

5 A. Yes.

6 Q. Okay. Now, have these guidelines
7 changed at all since the creation of the
8 Citywide Panel?

9 A. I -- with respect to the Citywide
10 Panel, which is really what I'm here to
11 discuss, I don't believe so. I could not tell
12 you if there were other elements of the
13 process that were altered, that were less,
14 shall we say, relevant to directly to my work.
15 I could not say for certain, as I sit here
16 today, whether other elements of it were
17 altered outside the scope of what we're here
18 to discuss today.

19 Q. And both elements of the guidelines
20 appear on the internet.

21 A. Uh-huh, yes.

22 Q. How has information about the
23 existence of these guidelines been
24 disseminated?

25 MR. HAIDER: Objection.

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2 A. As I've said earlier, generally we
3 were disseminating it to the agency personnel
4 officers, the EEO officers, the general
5 counsel of the agencies, so those managers who
6 have responsibility in the areas that that
7 guidance covers, and how the agencies took
8 those, that guidance and directives, and that
9 was really up to the individual agencies and
10 how the individual agencies operated.

11 Q. And you disseminated them by email
12 or by some other means?

13 A. By email, by email. I'm certain
14 there was an email, multiple emails probably
15 to the different groups, but there were
16 emails.

17 Q. Aside from the quality control
18 review that you and Sanford Cohen give to
19 decisions, is there any oversight of the work
20 of the City Panel from anyone?

21 MR. HAIDER: Objection.

22 A. Yeah, I'm trying to, you know --
23 generally, no, because there is no -- you
24 know, there is general oversight of the
25 overall process by Department of Citywide

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2 Administrative Services Law with respect to
3 legal or compliance, Office of Labor Relations
4 with respect to compliance with agreements,
5 but there's no sort of, like, super appeal
6 panel that reviews the work of the appeal
7 panel or, you know, an appeal panel manager or
8 something like that.

9 Q. Do panelists on the individual
10 panels ever change their minds or their
11 comments in the course of deciding an appeal?

12 A. Yes.

13 Q. And is that reflected anywhere in
14 the record of the appeal?

15 A. Yes. As I understand it, all
16 changes to the comments would be logged in the
17 database.

18 Q. So there is a spreadsheet that has
19 been provided to us that provides the
20 information from the database with respect to
21 the individual clients that we have in this
22 lawsuit. There's a column that says Old
23 Value. And is that column for the purpose of
24 providing comments that had been superceded?

25 MR. HAIDER: Objection.

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2 A. Yes. As I understand it, that is
3 listing comments that have since been changed.

4 Q. And if the column is blank, does
5 that mean that there's been no change in
6 position or that some material has been
7 deleted, or does it mean something else?

8 A. Well, I -- so I just want to go --
9 if it is blank, it means the comment has not
10 been changed. A change in a comment does not
11 necessarily reflect a change in position.
12 Most frequently, a change in a comment will be
13 because the Comment field is being used to
14 flag that there's been a follow-up request of
15 some kind so that a different reviewer doesn't
16 go in and vote and we wait -- and then it's
17 also flagged so the reviewer can go back in
18 and know -- and check to see whether the
19 agency has uploaded material in response to
20 the follow-up request. So it's not
21 necessarily that, oh, I'm putting in one
22 position in the comment, now I'm changing my
23 position. Comment field also is used for
24 flags as the case is being -- the appeal is
25 being decided.

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2 Q. How many individual members does the
3 Citywide Panel have at this time?

4 A. So let me walk through it. So there
5 are currently five people voting for the Law
6 Department, there are four people voting for
7 DCAS, there are two people actively voting on
8 the City Commission in Human Rights, and I
9 believe we just added one more person from the
10 Department of Health and Mental Hygiene, so
11 they're up to three.

12 Q. Up to three now?

13 A. Yeah.

14 Q. Okay.

15 A. They've gone back and forth because
16 they've had some personnel changes.

17 Q. So you've indicated that the
18 personnel who are involved on behalf of the
19 Department of Health and Mental Hygiene has
20 changed. What about from the other
21 departments? Are the same people providing
22 votes now from law, DCAS, and CCHR that were
23 involved at the very start?

24 A. Yes. And the fifth person in DCAS
25 was added fairly recently in response to the

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2 fact that we had a large number in February, I
3 think it was, of appeals filed with our panel
4 from the New York City Police Department. By
5 large, I mean I think it doubled the numbers
6 of appeals we had.

7 Q. What was the procedure for choosing
8 panel members?

9 A. The agencies were asked to -- told
10 what the panel was and what its function was,
11 and they were asked to supply qualified and
12 appropriate personnel to review these cases,
13 and they would report back to us with, you
14 know -- report back with name and email, and
15 at one point I, you know, after the agencies
16 reported in, I put together a meeting invite
17 to the group, and that was the panel.

18 Q. And that meeting invite was for sort
19 of a founding meeting for the Citywide Panel?

20 A. It was an orientation meeting, yes,
21 yes.

22 Q. And when was the orientation?

23 A. November 1, 2021.

24 Q. And how long did it take place?

25 A. I can't recall. It was between a

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2 half an hour and an hour.

3 Q. And was it recorded?

4 A. No.

5 Q. And is there any kind of a
6 transcript or notes that relate to the
7 meeting?

8 A. No.

9 Q. Do you know whether or not any of
10 the people who attended took notes or recorded
11 it?

12 A. I don't believe so, but I wouldn't
13 know for 100 percent certainty.

14 Q. What does it mean to say that
15 somebody is qualified to work on the Citywide
16 Appeals Panel? That's a word that you used,
17 "qualified and appropriate."

18 A. So --

19 MR. HAIDER: Objection.

20 THE WITNESS: Sorry.

21 A. Yeah, so the -- I think that that's
22 someone who understands the reasonable
23 accommodation process, someone who is capable
24 of reviewing a record, applying law to the
25 policy, and capable of understanding and, you

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2 know, and reaching a determination. So, you
3 know, primarily most of the agencies assign
4 lawyers to do it by and large. There may be
5 one or two who are nonlawyer EEO
6 professionals, but obviously experienced with
7 EEO process. Yeah, so that's what I mean by
8 "qualified."

9 Q. So the people who are on the panel,
10 what percentage of them have participated in
11 the initial stage of religious accommodation
12 reviews for various agencies?

13 MR. HAIDER: Objection.

14 A. Okay. "Initial stage" -- so you're
15 talking about making a determination for their
16 agency. Two members of laws panel, the
17 DOHMH -- one of the DOHMH representatives, and
18 that's it. I don't think any of the other
19 panel members were involved in the agency EEO
20 review, the actual sort of reasonable
21 accommodation process that took place
22 pre-appeal.

23 Q. And is there a procedure or a
24 protocol that the Citywide Panel has to make
25 sure that people who engaged in agency level

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2 initial reviews of reasonable accommodation
3 requests, are not also involved in
4 determination of their appeals to the Citywide
5 Appeals Panel?

6 A. Yeah, so, like, on the law side, as
7 I said, the only people involved at
8 agency-level determinations were two panel
9 members who are attorneys for the New York
10 City Housing Authority, and they do not vote
11 on any matters regarding the New York City
12 Housing Authority. The Department of Health
13 and Mental Hygiene, same sort of process. If
14 someone made the decision, they're not going
15 to turn around and then review the decision on
16 appeal.

17 Q. And is that protocol in writing?

18 A. No.

19 Q. How is it communicated to persons?

20 A. It was discussed -- when the various
21 agencies organized themselves, they discussed
22 how they were going to handle that, and so I
23 had that discussion with the two NYCHA Panel
24 members and DOHMH have that discussion amongst
25 their panelists.

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2 Q. And does anything, any record in
3 writing in the City, you know, a video record
4 or audio record, is there any record that
5 relates to those conversations?

6 A. No.

7 MR. HAIDER: Objection.

8 THE WITNESS: Sorry.

9 A. No.

10 Q. What subject matter expertise do the
11 individual panel members of the Citywide Panel
12 have with respect to medical and religious
13 accommodation requests?

14 MR. HAIDER: Objection.

15 A. As I said, by and large generally,
16 they are individuals who have either done one
17 of two things. Primarily, they're individuals
18 either legal or nonlegal who have been
19 involved in EEO reasonable accommodation and
20 compliance work and are familiar in that
21 regard.

22 Or with respect to the law panel
23 members, we have two attorneys on the panel
24 who are in our appeals division, and we sought
25 some assistance and support from the appeals

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2 division because they may not have as direct
3 EEO experience, but they have extensive
4 expertise in reviewing records and applying,
5 you know, factual and legal standards. And so
6 we wanted to tap into especially the law
7 panel, because if you think about our
8 perspective, our perspective is more the legal
9 compliance perspective, it seemed like that
10 would be good value added for the law panel.

11 Q. So from the standpoint of the law
12 panel, the two who are in the appeals division
13 who are members of the panel, they've had
14 experience in litigation, I presume?

15 A. Yes.

16 Q. And what about the other persons who
17 are -- the other three Law Department members
18 of the Citywide Appeals Panel? Do they also
19 have litigation experience?

20 A. So I am one of them, and yes, I have
21 litigation experience. The two members who
22 come from us, from the NYCHA General Counsel's
23 Office, I know at least one does; I don't know
24 if the other one does. There's one who's the
25 Head of NYCHA's Appeals Division, so same sort

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2 of concept, and then the other is an attorney
3 in their general couple's office who handles
4 the employment issues, but I don't know if
5 that's in an in-house capacity or a litigation
6 capacity.

7 Q. Now, you used the word "NYCHA," and
8 I'm presuming that is N-Y-C-H-A, a shorthand
9 for the New York City Housing Authority?

10 A. That is correct. I apologize for
11 not defining it. Yes, it is the New York City
12 Housing Authority.

13 Q. You see, I'll define it for you, if
14 you don't.

15 A. Thank you.

16 Q. So you spoke of the two who are in
17 the Appeals Division of the City Law
18 Department. Did they specifically have
19 experience with appeals involving matters that
20 are related to religion?

21 A. They don't focus on it, but they
22 have had -- I don't know religion
23 specifically, but they've worked on employment
24 matters in the past. I don't know whether
25 there was a religious reasonable accommodation

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2 at issue in any of their cases.

3 Q. So is there any kind of a firewall
4 that the Citywide Appeals Panel or the Law
5 Department puts in place to make sure that the
6 people who are deciding religious
7 accommodations and medical accommodations have
8 not also been directly involved in litigating
9 issues related to, you know, persons who are
10 making religiously-related claims against the
11 City or who are making medical accomodation
12 kinds of claims against the City?

13 MR. HAIDER: Objection.

14 A. So the answer is yes. Our EEO
15 officer and her staff are not on the panel,
16 and they handle the Law Department's agency
17 determinations pre-appeal. And obviously,
18 none of the attorneys or personnel in The
19 Labor and Employment Law Division are on the
20 panel because their function will be to defend
21 the mandate and defend individual cases in
22 litigation.

23 Q. I understand what you've said with
24 respect to the people who are not acting on
25 the panel. But with respect to the people who

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2 are on the panel, is there any kind of a
3 firewall set up to make sure that they have
4 not litigated issues that are, you know,
5 relevant to the determination of whether or
6 not a claim is religious in nature in the
7 religious accommodation appeals? That's the
8 end of the question.

9 A. I mean --

10 MR. HAIDER: Objection.

11 A. Yeah, other than if, for example,
12 there's a review of a case and this is a case
13 that someone's either been involved with in
14 litigation or something like that, which is
15 almost, you know, would be virtually
16 impossible outside of me, and I can tell you
17 in the context of me, if I was reviewing a
18 case, and this did happen on at least one
19 occasion that I can think of, and I understood
20 the fact pattern and the agency to be
21 something not that I litigated, but that I
22 provided legal advice to the agency, I would
23 not vote on it, and I would not, you know,
24 talk with any -- we don't talk with each other
25 about the merits, for example.

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2 You know, so I think that's what you
3 mean by "firewall." It wouldn't -- you know,
4 if we had some first-level involvement or
5 litigation involvement with a particular
6 individual or their issue, we wouldn't be
7 influencing any panel member in any way on how
8 it goes. We might have to have a procedural
9 discussion, but, I mean, we wouldn't be
10 discussing substance at all.

11 Q. So with respect to yourself, it's
12 kind of a personal understanding of what your
13 responsibilities are; is that correct?

14 A. I think the -- I -- the remaining
15 panel has the same understanding. We all
16 understood we should not be -- the reason I
17 say me personally is because I cannot think of
18 a member of the panel serving who -- the other
19 members of the panel, that are outside of the
20 NYCHA example and the Department of Health, I
21 cannot think of another member of the panel
22 who is dealing with religious, reasonable
23 accommodation issues with respect to the
24 individuals whose appeals we're hearing.
25 Obviously, broadly speaking, we have members

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2 of Citywide Equity & Inclusion on the panel,
3 so they deal with it broadly speaking, but not
4 with respect to any individual case.

5 Q. Well, okay. I understand that you
6 all individually feel a duty not to
7 participate in a case in which you're
8 personally involved. But, you know, there is
9 also an issue of subject matter and whether or
10 not a person has worked on that subject matter
11 in litigation in a way that may be contrary to
12 the religious -- the nature of the religious
13 claim that is being raised in an accomodation
14 request. Do you have any kind of a subject
15 matter firewall in place to prevent people who
16 have formed legal opinions about religious
17 issues from participating in decision-making
18 with respect to religious accommodation claims
19 that are made by employees?

20 DI MR. HAIDER: Objection. I'm going
21 to instruct my witness not to answer, most
22 importantly because it's outside the scope
23 of the order for the Rule 30(b)(6).

24 At this point we've allowed a lot of
25 background questions and foundational

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2 questions to get to the two topics, which
3 is the Citywide Panel's process and the
4 standards used by the Citywide Panel.

5 The composition of the Citywide
6 Panel, while we have allowed some
7 questions, is certainly not at issue here,
8 so I would instruct the witness to not
9 answer that question.

10 MR. NELSON: I'll ask -- I think I
11 am entitled to know with respect to the
12 issues into which I am inquiring with
13 respect to standards and also with respect
14 to procedures.

15 Q. Specifically, with respect to
16 procedures, is there any written firewall
17 policy that the Law Department has that
18 relates to the Citywide Panel participation?

19 MR. HAIDER: Objection.

20 And just to get to the point of
21 whether that's in the scope, can you
22 define what you mean by "firewall"? I
23 think that's a little confusing here, and
24 then perhaps I will allow it even, maybe
25 it's within the scope. At this point, I

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2 don't see how it is.

3 MR. NELSON: So firewall is a pretty
4 well understood concept which creates a
5 bar for people who have a prior knowledge
6 with respect to a subject matter or other
7 kind of involvement with a subject matter
8 from participating in matters that might
9 be thought to be kind of a conflict which
10 would involve the same subject matter.
11 And so, that's my definition of firewall.
12 So --

13 MR. HAIDER: Can you repeat the
14 question? With that understanding of that
15 definition?

16 MR. NELSON: I can't repeat it
17 exactly, no, but I will ask it again.

18 BY MR. NELSON:

19 Q. Does the Law Department have any
20 kind of a firewall, written or oral, that
21 relates to the participation of Law Department
22 members on the Citywide Panel?

23 MR. HAIDER: Objection.

24 A. So I think we're mindful of -- and I
25 know there have been courts that have weighed

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2 in on this issue that someone's legal work as
3 an advocate for a client is not disqualifying
4 in any way from their ability to be a neutral
5 adjudicator. So I think as I understand the
6 premise of the question, it's if someone has,
7 for example, defended a religious -- a denial
8 of a religious reasonable accommodation in
9 religion, that somehow we should be
10 disqualifying them from serving on the panel.
11 No, we did not do that.

12 I think the whole point here, and I
13 talk about the different perspectives of the
14 agency, is to bring in -- different
15 perspectives of the agency, is to bring in
16 multiple areas of knowledge and perspective
17 and people who have dealt with, be it in an
18 EEO capacity or in a litigation capacity on
19 either side of the V, religious reasonable
20 accommodation requests, EEO matters,
21 employment discrimination, the duty to
22 reasonably accommodate, have knowledge that
23 can improve our reasonable accommodation
24 process. So no, there would not be a policy
25 that if someone has expertise in that area

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2 owing from litigation generally, that we would
3 remove them or screen them off from the panel.

4 Q. And have you ever had any
5 discussions with other members of the Law
6 Department about whether or not it would be
7 appropriate for them to participate either in
8 the Citywide Panel process as a whole or on an
9 individual panel relating to a specific
10 appeal?

11 MR. HAIDER: Objection. I'm going
12 to instruct my witness to limit his answer
13 to things that are not covered by the
14 attorney/client privilege.

15 THE WITNESS: Right.

16 A. And I would say that I think I've
17 covered the substance of any discussion I've
18 had on that with why we engage certain groups
19 of people and did not engage certain groups of
20 people. Obviously, our EEO officer in our
21 staff would be highly qualified, but they had
22 to handle all the individual cases in the
23 first instance, all the individual requests
24 that the Law Department received. And The
25 Labor and Employment Law Division was having a

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2 function where they would actually defend
3 these decisions and mandate any reasonable
4 accommodation and employment discrimination
5 issues that arose from it in litigation, and
6 that was the substance of how we decided to
7 choose -- or where we drew members of the
8 panel from.

9 Q. Now, at the -- withdrawn.

10 The Citywide Appeals Panel members
11 were chosen, as I understand your testimony to
12 be, in part because of their prior experience
13 with issues that relate to religious
14 accommodation. And what materials, if any,
15 were provided to these members of the Citywide
16 Appeals Panel that related to or trains them
17 on the nature the religious accommodations and
18 on the way in which adjudicators of religious
19 accommodation claims, you know, should
20 consider such questions?

21 MR. HAIDER: Objection. Again,
22 outside the scope.

23 I'll allow the witness to answer.

24 A. Yeah, I -- again, you have to
25 remember we're dealing with people who have

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2 extensive knowledge and expertise of that.
3 There was not a particularly strong need to
4 train people on things they were already
5 familiar with. We did refer the entire panel
6 to the EEOC Guidance specific to COVID-19
7 vaccination, and the two documents, the FAQ
8 document, I believe the reasonable
9 accommodation process document, so that they
10 can familiarize themselves with the
11 particulars of our work. But every member of
12 the panel came to the panel with an
13 understanding of the law of reasonable
14 accommodations, both religious and medical
15 generally, and how those processes work at a
16 city agency level and the legal level.

17 Q. Have you personally discussed or
18 participated in the Kane/Kyle case or the
19 NYFRL case, the instant case in which we're
20 deposing you in?

21 A. Yeah.

22 DI MR. HAIDER: Objection. I'm going
23 instruct the witness, well, not to answer
24 with respect to questions related to the
25 Kane and Kyle litigation.

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I believe the second part of the question, you were directing him about this litigation; is that correct, Mr. Nelson?

MR. NELSON: This litigation, yes.

MR. HAIDER: You can answer with respect to this litigation.

A. So with respect to this litigation, I've participated essentially in a -- primarily in a position fairly unique to me, which is as someone who is more of a client resource than as an attorney overseeing and directing litigation.

MR. NELSON: What is the nature of the objection with respect to the Kane and Kyle question?

MR. HAIDER: Again, outside the scope of the two fact -- the two topics that are subject to this 30(b)(6), which is the Citywide Panel's process in reviewing and the standards used by the Citywide Panel.

MR. NELSON: So referring to standards, Mr. Eichenholtz's repeatedly

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2 referred to the EEOC's Guidance with
3 respect to COVID-19.

4 Q. Do you understand -- withdrawn.

5 Does that guidance, in the view of
6 the panel, alter the sort of nonCOVID-19 EEOC
7 Guidance with respect to how cases should be
8 adjudicated?

9 MR. HAIDER: Objection.

10 A. I understand it to be guidance
11 applying those standards to a specific and
12 very unique set of circumstances.

13 Q. And is there any way in which the --
14 when which the guidance is to be applied or is
15 applied by the Citywide Panel to COVID-19
16 circumstances and applications made during
17 COVID-19 that relate to the vaccination that
18 is different from the way that the EEOC
19 standards would be applied in other contexts?

20 MR. HAIDER: Objection.

21 A. Not that I'm aware of.

22 Q. All right. So all the definitions
23 that are in the EEOC Guidance would remain the
24 same, so far as the panel is concerned as, you
25 know, in the nonCOVID-19 context?

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2 A. Yes. Again, the understanding that
3 we're talking about an area of the law that
4 turns on very specific and individualized
5 facts and circumstances, right, so yes, but
6 I'm trying to also make space for the fact
7 that we are -- you know, this is not your
8 run-of-the-mill, nonemergent EEO reasonable
9 accommodation request. So I just wanted to
10 make that distinction. That's one of the
11 reasons the EEOC issued specific and detailed
12 guidance on this topic.

13 Q. In what percentage of the cases that
14 have been decided to date by the Citywide
15 Panel have you acted as one of the voters?

16 A. I do not have those numbers.

17 Q. In about how many cases have you
18 acted as a voter?

19 A. I don't have that -- we don't break
20 it down -- I don't have access to numbers --
21 direct access to numbers to break it down by
22 voter. So I can't say that Eric Eichenholtz
23 voted on X number of appeals thus far. I
24 could tell you how many the Law Department
25 voted on, but how many of those Law Department

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2 votes are mine personally, I could not tell
3 you.

4 Q. But you are a voter, of course?

5 A. Yes.

6 Q. And you've voted on some cases that
7 are involved in NYFRL obviously, we know that?

8 A. Yes, of course.

9 Q. So my question about your
10 involvement in the Kane/Kyle litigation
11 relates to the question of conflict of
12 interest. You know, very similar issues are
13 raised in both matters, and so, you know,
14 we're really entitled to know whether or not
15 you've been involved in the City's defense in
16 that litigation.

17 I ask the question again: Have you
18 been involved or participated in any way in
19 the Kane and Kyle cases?

20 DI MR. HAIDER: Objection. At this
21 stage of limited discovery and the order
22 that provided for this 30(b)(6) witness,
23 Mr. Eichenholtz's potential conflict that
24 you are articulating for how many votes he
25 has done, whether it's in this litigation,

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2 the Kane and Kyle litigation, or all
3 Citywide Panel, is not subject to this
4 30(b)(6) witness testimony here today, and
5 I'm instructing my witness to not answer
6 that question.

7 Q. Do the DCAS or DOHMH or CCR agencies
8 have any firewall policies relating to
9 participation of their employees in the
10 Citywide Appeals Panel process?

11 MR. HAIDER: Objection.

12 A. Yes. The City Commission on Human
13 Rights does not involve its Law Enforcement
14 Bureau in the Citywide Appeals Panel process
15 because the Law Enforcement Bureau of the City
16 Commission on Human Rights is charged with
17 reviewing and potentially prosecuting charges
18 of discrimination that could involve denials
19 of reasonable accommodations from City
20 employees or otherwise. The Department of
21 Citywide Administrative Services -- oh, and
22 also, CCHR similarly does not involve its
23 in-house EEO officer and their staff on these
24 matters.

25 The Department of Citywide

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2 Administrative Services, again, their panel
3 members are citywide policy -- Citywide Equity
4 & Inclusion and general counsel office policy
5 makers, not members of their EEO office, who
6 would be asked in the first instance to review
7 these request for reasonable accommodations so
8 that you don't have the issue of someone whose
9 been involved in these cases below, to use
10 your word, Mr. Nelson, are then voting on
11 these cases on appeal.

12 Q. Just to clarify, this is not a
13 question, but below has no qualitative or, you
14 know, there's no disparagement in saying that
15 a person in this context is someone who is --

16 A. As someone who has practiced my
17 entire legal career in terms of litigation in
18 trial courts, I can tell you that below does
19 not have any negative connotations.

20 Q. Right. We'll agree on that.

21 So in this context of the formation
22 of the Citywide Panel, was there ever any
23 discussion of the Kane and Kyle case?

24 A. No.

25 Q. And in subsequent communications

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among the Citywide Panel, has there been any discussion of developments in the Kane/Kyle case?

DI MR. HAIDER: Objection. Again, I'm going to instruct the witness not to answer.

This question does not touch on the Citywide Panel's process nor the standard that the Citywide Panel applies.

MR. NELSON: But it does go to the question of the panel, since one of the major issues involved in Kane/Kyle was the unconstitutionality of the standards that are being applied by the Department of Education. So I would ask you to waive your objection and permit the client -- the witness to answer.

DI MR. HAIDER: I will at this point direct him not to answer.

However, I am open if the question is rephrased in a manner that is on point as more similar to the way you just phrased it to me.

Q. So Mr. Eichenholtz, was the decision

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2 of the second circuit or the question of
3 standards applied in the Kane/Kyle case ever
4 discussed among members of the Citywide Panel,
5 to your knowledge?

6 A. In the context of when we received
7 the DOE cases that we were receiving, the
8 background of the decision and the fact that
9 we were to be applying the legal standards we
10 had been applying to City cases were
11 discussed. Certainly the 14 plaintiffs, there
12 was a discussion of the fact that we were
13 being court ordered to do so, so the panel was
14 aware of why we were -- you know, we would
15 sort of go through cases in the order we
16 received them, we were given a short time
17 frame there, so we had to discuss the time
18 frame and things like that. So those sorts of
19 discussions were had with the panel.

20 Q. And what about the nature of the
21 standards that had been used at Kane and Kyle
22 for the agency adjudications?

23 A. Other than the standard -- we
24 discussed the standards we were going to be
25 using based on what the Court had told us we

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2 were going to be using, which was essentially
3 what we had been using, so -- you know, I
4 don't think there was a discussion of, well,
5 there was this arbitration award that applied
6 this standard, and we're not going to use this
7 standard because, you know, when it was being
8 discussed, you wouldn't muddy the issue in
9 that way. The important thing was what we
10 were getting, when we had to decide, and what
11 standard we, the Citywide Appeal Panel, needed
12 to decide. It didn't matter what happened
13 before the arbitration, other than we were
14 going to disregard that and apply the
15 standards that we were applying.

16 Q. So, just to clarify and follow up,
17 the Second Circuit's decision sending cases to
18 the panel also severely criticized certain
19 standards that had been applied to those
20 decisions -- the agency decisions in the Kane
21 and Kyle cases. And are you saying, then,
22 that the panel members were never instructed
23 to stay away from the standards and methods of
24 decision-making that were criticized by the
25 Second Circuit Panel?

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2 MR. HAIDER: Objection.

3 A. We were never using, nor would we
4 use those standards and methods of
5 decision-making that the Second Circuit
6 criticized in that case. We were applying the
7 legal standards, the guidance provided, and
8 that has been, at least in my understanding,
9 consistently affirmed in subsequent cases and
10 litigation. So we wanted to do what we were
11 doing because the judicial feedback, the legal
12 research we were doing, we were doing the
13 right thing. So we're not going to start
14 discussing other standards and saying, well,
15 there's other standard used in this other
16 circumstance and that's wrong. We were
17 talking about the standards we were using and
18 how we were applying it in our work.

19 MR. HAIDER: Mr. Nelson, I would
20 request another ten-minute break.

21 MR. NELSON: That's fine. We're
22 almost up to noon. Would you like to
23 break now for 45 minutes to have lunch?

24 THE WITNESS: It's --

25 MR. HAIDER: It's a little on the

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2 early side.

3 THE WITNESS: I don't know how much
4 more you have to go, but, you know, if
5 we're going to go deep into the afternoon,
6 I'd rather go a little further,
7 personally.

8 MR. NELSON: That's fine. Let's
9 take ten minutes, then.

10 THE WITNESS: Okay.

11 THE VIDEOGRAPHER: We're now going
12 off the record. The time is 11:41.

13 (Recess was taken.)

14 THE VIDEOGRAPHER: We are now back
15 on. The time is 11:53.

16 MR. NELSON: Very good.

17 BY MR. NELSON:

18 Q. Do you recall the last question that
19 I asked you, Mr. Eichenholtz?

20 A. Not at all, Mr. Nelson, I apologize.

21 Q. Oh, okay.

22 MR. NELSON: I'll ask the court
23 reporter to read back the last question,
24 please.

25 (Record read.)

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2 Q. Okay. So my follow-up question,
3 Mr. Eichenholtz, is: Can you give a yes or no
4 answer to that question?

5 A. The answer's yes. Oh, wait, and I
6 apologize, because there was a double
7 negative. I need to -- the answer is -- let
8 me just phrase it.

9 They were instructed not to apply
10 that standard when they were instructed to
11 apply the Title VII standard.

12 Q. Were they given the negative
13 instruction not to use the standards that were
14 used in the Kane and Kyle adjudications?

15 A. Yes.

16 Q. So they were told, these were the
17 standards that were used in Kane and Kyle,
18 they are the wrong standards, you are not to
19 use these, or words to that effect?

20 A. I don't know if it was words to that
21 effect, but they were told that the
22 arbitrators utilized this standard, that we
23 were to disregard that, and to apply the
24 standards we've been applying in our cases.

25 Q. And were they told what the

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2 standards were that they were not to apply?

3 A. I don't recall if we -- I -- like I
4 said, certainly we did not go into detail as
5 to what that arbitration award standard was,
6 no.

7 Q. So you didn't go into detail as to
8 the specific standards that they were not to
9 apply that had been applied by the
10 arbitrators; is that correct?

11 MR. HAIDER: Objection.

12 A. I don't recall the extent to which
13 those standards were referenced. The
14 important information that was conveyed to the
15 panel was the standards they were to apply.

16 Q. How were the members of the agencies
17 that were making the decisions below, the
18 decisions that were being reviewed by the
19 Citywide Appeals Panel, how were the
20 decision-makers in those agencies trained with
21 respect to the applications of law or
22 standards to religious accommodation requests?

23 DI MR. HAIDER: Objection. I would
24 instruct my witness not to answer.

25 That question is outside the scope

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2 of the 30(b)(6) witness. The topics are
3 the Citywide Panel's process and
4 standards; not the agencies below or, you
5 know, any other City agency's process or
6 standard. So I'm going to instruct my
7 witness not to answer.

8 Q. How were the Citywide Appeals Panel
9 members trained with respect to the standards
10 that they were to apply to religious
11 accommodation requests?

12 A. So I think I've addressed this a few
13 times now. They were -- most of the members
14 of the panel came to us with significant EEO
15 and reasonable accommodation employment
16 discrimination experience and were very
17 familiar with how a reasonable accommodation
18 process works. We provided the EEOC Guidance.
19 We discussed generally as we went along any
20 big-picture issues at our check-in. Obviously
21 if there were legal developments, we -- the
22 legal developments were shared with all the
23 panel members. And so, the panel members were
24 kept abreast of the standard, but they came in
25 with a base of knowledge regarding the work

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2 that they were doing.

3 Q. Do you know how these individual
4 panel members were trained with respect to the
5 application of standards to religious
6 accommodation claims?

7 DI MR. HAIDER: Objection. Again, I'm
8 going to instruct the witness not to
9 answer.

10 You know, the training is certainly
11 not a topic here. Again, the two topics
12 are the Citywide Panel's process of
13 reviewing and the standards used by the
14 Citywide Panel in its review. Although we
15 allowed some questions about the
16 formation, the formation and training of
17 the Citywide Panel is not subject to this
18 30(b)(6).

19 MR. NELSON: Well, it is, because
20 the testimony has been so far that the
21 reason why these persons are members of
22 the panel in the first place is that they
23 have experience and are familiar and they
24 have -- you know, that they've done this
25 before. You know, and so presumably the

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2 people are relying upon that experience
3 and their familiarity with rules in making
4 their decisions on the panel, which are
5 not reviewed in substance at the
6 quality-control level. So the entire
7 framework of this depends upon the
8 training and the understanding that these
9 people had before they became members of
10 the panel because they never got it on the
11 panel.

12 MR. HAIDER: You know, whether or
13 not their training of the panel members is
14 relevant, I'm not really going to argue at
15 this point. The only thing I will point
16 to is that the training of the Citywide
17 Panel is not a topic here.

18 MR. NELSON: It goes strictly to the
19 standards.

20 DI MR. HAIDER: Yeah, Mr. Eichenholtz
21 can testify to the standards that the
22 Citywide Panel was asked to apply, which
23 he has done numerous times. You know, the
24 panel members' history, you know, prior to
25 this being put on the panel is actually

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2 not relevant. Admittedly, we allowed some
3 of these questions for foundational
4 purposes so as to, you know, allow the
5 depositions to go smoothly to provide some
6 context. However, training or, you know,
7 experience is not -- the panel members'
8 experience is not subject to this 30(b)(6)
9 witness.

10 And so I'm instructing the witness
11 not to answer.

12 MR. NELSON: Well, you know, we know
13 from the information we've been given
14 about the structure of the panel and the
15 procedure that the panel follows that
16 these persons, each of them is essentially
17 acting as independent decision-maker,
18 independent judge, and, you know, since
19 that's the procedure, you know, and it
20 sounds like there's no enforcement of
21 whether they follow one set of guidelines
22 or another, I think it's very important to
23 know, you know, what these persons had
24 been trained to do, because clearly, you
25 know, I think the whole purpose for

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2 bringing them on to the panel was to have
3 them use their training. We don't know
4 what the training is. And we know very
5 little about what each of these panel
6 members is bringing to the process of
7 making these votes, these sovereign votes.

8 MR. HAIDER: So we have allowed
9 questions and answers about what was
10 discussed during the Citywide Panel
11 meeting as to the standards being used,
12 how that message was conveyed. You are
13 now asking, the previous question was
14 about prior training as to the subject
15 matter here. Again, that's outside the
16 scope. So we've already allowed the
17 questions as to what information they
18 received from the Citywide Panel or, you
19 know, Mr. Eichenholtz or other members of
20 the panel discussed as relates to the
21 standards.

22 BY MR. NELSON:

23 Q. Mr. Eichenholtz, do you at least
24 know what training they received?

25 DI MR. HAIDER: Objection. Again, I'm

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2 instructing the witness not to answer
3 based on the previous stated grounds.

4 MR. NELSON: Well, this goes to the
5 basis of his knowledge.

6 DI MR. HAIDER: Okay. Again, this is
7 knowledge to questions that are not
8 relevant. We can flag this, we can call
9 the Court now, we can flag it to call the
10 Court.

11 But I am going to instruct the
12 witness to not answer any questions about
13 training that panel members may have
14 received prior to the formation of the
15 panel. It's not relevant to this
16 testimony at this stage of the litigation.

17 BY MR. NELSON:

18 Q. Mr. Eichenholtz, did you or anyone
19 else involved in the panel have any direct
20 communications with Bill DeBlasio about the
21 panel?

22 A. No.

23 Q. And did you have any such
24 conversations with him about the nature of
25 religious accommodations or the process for

1 E. EICHENHOLTZ

2 religious accommodations or the standards?

3 A. I've never spoken with Bill DeBlasio
4 in my life about any topic.

5 Q. All right. And what about Mayor
6 Adams?

7 A. I have had discussions with the
8 mayor about the vaccine mandate generally, not
9 about the citywide appeal process or how cases
10 are adjudicated.

11 Q. And please tell us the sum and
12 substance of those conversations.

13 A. I --

14 MR. HAIDER: Objection.

15 THE WITNESS: Yeah.

16 MR. HAIDER: You can answer.

17 A. I cannot do so due to
18 attorney/client privilege. I was in the
19 function of conveying legal advice to the
20 mayor.

21 Q. Do you know whether or not any of
22 the panelists were aware of former Mayor de
23 Blasio's statements that he made, while he was
24 mayor, regarding what criteria would be
25 acceptable for religious exemptions?

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MR. HAIDER: Objection.

A. I would have no independent way of knowing that other than our discussions, and it never came up in those discussions when we talked about standards and how they were to be applied.

Q. Did you ever discuss with anyone on the panel about, you know, Pope Francis having a view that there's nothing in the scripture that suggests people shouldn't get the vaccine?

A. We had discussions in discussing various cases and how to handle them, that Pope Francis, in his capacity as the institutional leader of the Catholic Church, had made such pronouncements and that the fact that he did so was not dispositive in any given case.

Q. And did you ever discuss in conversations with members of the Citywide Appeals Panel the assertion that two well-established religions, Christian Science and Jehovah's Witnesses, have a history of religious opposition to vaccination?

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2 A. I don't remember specifically having
3 those discussions. With respect to all
4 religions, we discussed we were going to
5 review the facts and the documentation before
6 us to understand the source of the employees'
7 belief and whether or not there's a conflict
8 between that belief and the vaccine
9 requirement.

10 Q. Did you have any discussion with
11 anyone on the Citywide Appeals Panel as to
12 whether or not Pope Francis' views were
13 relevant to the determination of anyone's
14 religious accommodation, even if they were not
15 dispositive?

16 A. Certainly the fact that
17 institutionally, the church was permitting
18 vaccination could potentially be relevant in
19 particular fact patterns. Beyond that, no, we
20 were -- we review these requests based on the
21 information the employee provides us about the
22 nature of their religious belief, their record
23 as a whole, and all of the facts underpinning
24 that belief.

25 Q. And in any of these discussions, you

1 E. EICHENHOLTZ

2 know, what fact patterns did you discuss, if
3 any, were ones in which Pope Francis' views
4 might be relevant?

5 A. No particular fact patterns;
6 however, it isn't to say it isn't this fact
7 pattern or that fact pattern. There are cases
8 in which the employee would say sort of as a
9 blanket statement, as a Catholic, I should be
10 exempt from this vaccine, without more detail
11 or explanation even after interaction, for
12 example, you know, that that might not be
13 enough because there is no -- we're not
14 stereotyping Catholicism one way or the other,
15 right? We're not stereotyping Catholicism
16 based on the Pope's pronouncement, we're not
17 stereotyping Catholicism based on the fact
18 that some Catholics would have a contrary view
19 to the Pope. We were looking at -- with
20 Catholics, we would have to look at the nature
21 of the employee's belief, the source, and
22 whether the beliefs the employee was
23 articulating were conflicting with the vaccine
24 requirement.

25 Q. And what if one of the voters failed

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2 to do that? Was there any control that you or
3 anyone else would have that, you know, would
4 empower you to bring that voter back to look
5 again at the facts if the voter had failed
6 to -- apparently failed to see or to reflect
7 upon the existence of facts that would support
8 having such an objection to vaccines, despite
9 the contrary opinion of someone in authority
10 in the faith?

11 MR. HAIDER: Objection.

12 You can answer.

13 A. I'm not aware of any such
14 circumstance. So I do know that when there's
15 a potential issue that's flagged either
16 because we've had a change of information or a
17 whole host of reasons, and we may need a panel
18 to review what they did, we will do that. I'm
19 not aware of any circumstance where a panel
20 member did not properly apply the standard in
21 reviewing the reasonable accommodation
22 request.

23 Q. But would it be fair to say that
24 that wasn't one of the objects of your quality
25 control review, that you take two minutes on

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the average to perform for each case?

MR. HAIDER: Objection.

A. So it wouldn't be a primary focus, but, you know, a lot of the -- yeah, I mean, no. Like I said, we would flag substantive issues if they were raised when we were doing quality control. But in doing that work, I have never seen a substantive issue raised with respect to the application of the standard.

Q. On how many occasions did you raise a substantive issue with a voter, aside from just a conflict between a vote and the comment, in your experience?

A. It's rare. Like I said, maybe a dozen times. It's usually some sort of irregularity, and it may often not be the voter's fault. For example, a medical appeal routed to the religious, you know, CCHR. You know, things like that. So generally, it is rare.

Q. But that wasn't something you were specifically looking for in the course of your quality control; is that correct? Because as

1 E. EICHENHOLTZ

2 I recall your testimony about quality control,
3 it had more to do with procedural things than
4 substantive questions.

5 A. Yeah. Again, but if there's a
6 substantive issue that stood out to me, you
7 know, let's say it's, you know, it's a
8 Catholic requesting a reasonable accommodation
9 and there's some comment about the Muslim
10 religion, obviously, I would flag that.
11 That's never happened.

12 But I'm not -- I guess the best way
13 I can put it for you is, I'm not there to
14 second guess the judgment, the factual -- the
15 balancing of the various facts and the
16 credibility assessments of each individual
17 panelist. That's why we have three panelists
18 from three different agencies.

19 Q. You indicated that the cooperative
20 dialogue process was something that ought to
21 occur or was -- if it were to occur, it should
22 have occurred at the agency level. If that
23 was a process that -- well, I'll withdraw the
24 second sentence there.

25 Did you observe that there were some

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2 agencies that engaged in the cooperative
3 dialogue process more than other agencies?

4 DI MR. HAIDER: Objection. I'm going
5 to instruct the witness to not answer that
6 question as it's outside the scope as to,
7 you know, comparing the agencies.

8 Again, the scope here is the
9 Citywide Panel's process in reviewing and
10 the standards used by the Citywide Panel.

11 Q. Mr. Eichenholtz, in review of an
12 agency's decision, did the Citywide Appeal
13 Panel members have a practice of giving the
14 same standards and process of review for
15 decisions that were made by agencies which
16 engaged frequently in the cooperative dialogue
17 process as opposed to those that did not do
18 so?

19 MR. HAIDER: Objection.

20 You can answer.

21 A. So agencies generally went about
22 going through the cooperative dialogue process
23 in different ways. Agencies went about
24 gathering the information and engaging the
25 employees in different ways. I would not say

1 E. EICHENHOLTZ

2 it was a competition where one did a better
3 job than the other.

4 There were times where we would
5 have, you know, them be very brief cooperative
6 dialogue, but it would be very relevant and
7 salient, and there would be times where there
8 may be a longer one where there wasn't. So
9 what we would do is, we would look at the
10 materials that the agency had done, the
11 cooperative dialogue they had engaged in, and
12 we'd review it. And if we felt that
13 additional questions, cooperative dialogue
14 usually was very targeted when we do so, if it
15 was necessary, we would make that inquiry of
16 the agency.

17 Q. Do all the members of the Citywide
18 Panel work full time and exclusively on
19 matters related to the Citywide Panel?

20 A. No.

21 Q. Then what percentage of the work
22 time of panel members is devoted to Citywide
23 Panel matters?

24 A. That is heavily dependent on the
25 panel members, you know, and what percentage

1 E. EICHENHOLTZ

2 of the agency's cases they're reviewing,
3 things like that.

4 Q. And is there is a range of the
5 amount of time that people spend or the
6 percentage of time that they spend? Does
7 every panel member, for example, work at least
8 50 percent of the time? Does no panel member
9 work more than 80 percent of the time on, you
10 know, panel matters?

11 A. It's --

12 MR. HAIDER: Objection.

13 THE WITNESS: Yeah, okay. Sorry.

14 A. It's tough to quantify in that way
15 because, to be quite frank, I think everyone
16 on the panel member are City managers, and the
17 obligation of City managers is to work the
18 time needed to get the work done. So, for
19 example, if I have or any panel member has an
20 insufficient amount of time in that workweek
21 to get the work that they wanted to get done
22 on the panel work done, then they're working
23 on it maybe over the evening or over the
24 weekend. So it's not like you're there 9 to 5
25 and you're spending three hours a day on

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2 average on it, so it's tough to quantify in
3 that way.

4 And like I said, given the work
5 obligations and the involvement of various
6 panel members, the amount of cases they need
7 to review are different. Obviously DOHMH, as
8 you can tell from the numbers we discussed
9 earlier, have far less cases to review than
10 DCAS for the Law Department, for example.

11 Q. On average, how many appeals is each
12 panelist expected to decide each week?

13 A. There is no expectation. The
14 agencies divide the work amongst the panel
15 members as they best -- as best fits that
16 agency's needs and to keep the workflow going.

17 Q. Now, do you know whether or not
18 there was ever a meeting in which you did not
19 participate in any of the agencies in which
20 the procedures or standards that the voters
21 from that agency would be expected to follow
22 in performing their work as voters on the
23 Citywide Appeals Panel?

24 MR. HAIDER: Objection.

25 Just seeking clarification. Are you

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2 referring to the Citywide Panel meetings?
3 You did reference agency meetings.

4 MR. NELSON: So what I'm referring
5 to is some meeting at which the panel
6 members from a particular department met
7 to discuss how they were going to handle
8 their work on the panel.

9 MR. HAIDER: Objection.

10 You can answer.

11 A. So I obviously can't definitively
12 rule out any discussions, but I can tell you
13 from my work with the individual panel members
14 and my discussions with the different agency
15 panel members, agency-specific discussions
16 were primarily on issues of dividing up cases,
17 case management, etcetera. They were not
18 focused -- because again, we work generally --
19 we were all working off the same standards and
20 we discussed them as a group. You know, I
21 generally, when there were questions about
22 standards, they were brought up in the group,
23 you know, and sometimes even panel members
24 from other agencies would raise the issue to
25 me and I'd say, well, let's discuss it at our

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2 next check-in, for example. So based on my
3 understanding, if it was happening, it was
4 exceptional and rare, that generally we were
5 discussing standards together.

6 Q. But you don't know whether there
7 were such meetings or not?

8 A. Right, I can't rule it out
9 definitively because I'm not in the room with
10 every panel member all the time, so no, I
11 can't rule it out definitively.

12 Q. And that sort of raises the question
13 of: What is the basis of your knowledge for
14 how the other departments, not the Law
15 Department, handle the reviews that their
16 panel members conduct of the appeals?

17 A. Because we've had both in check-ins
18 and myself with each agency-specific
19 discussions with those agencies on how they
20 are handling the cases. So I'm aware of how
21 every agency is handling the appeals.

22 Q. Now, previously you've indicated,
23 you know, that so far as you know, there are
24 no notes that had been taken at the various
25 kinds of meetings we've been discussing. The

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2 answer is really, though, with respect to
3 that, that if there were some there, you just
4 don't know about them, right?

5 MR. HAIDER: Objection.

6 A. Yes, that's entirely possible.

7 Q. Okay. So in reviewing appeals from
8 the City agency's denial decisions, how much
9 weight were panel members instructed to give
10 to the reasoning or analysis of the agency?

11 A. In terms of weight, you know, no
12 more or less than any other fact that we had.
13 We were looking at why the agency did what it
14 did, right? And so, it was relevant because
15 we needed to understand why it was denied.
16 But if the agency didn't have a basis for
17 denial or the agency had multiple bases for
18 denial and the panel member says it thinks --
19 if you have one really strong basis here and a
20 bunch that are questionable, the panel member
21 doesn't have to say, follow what the agency
22 did. So it's, you know, like I said, it's
23 close in our appellate review spectrum that we
24 discussed before, it was closest to de novo
25 review as it was described to the panel

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members.

Q. Did the City have a policy of asking only vaccinated people to serve as panelists on the Citywide Appeals Panel?

A. No.

THE WITNESS: Sorry.

MR. HAIDER: Objection.

A. No.

Q. Are there any unvaccinated persons who are serving on the Citywide Appeals Panel?

DI MR. HAIDER: Objection. I would instruct the witness not to answer as it's outside the scope of the order.

MR. NELSON: It does relate to the ability of the panelists to serve their function objectively, so I think it's pretty important.

Q. I would ask you to answer.

DI MR. HAIDER: Again, objection. I'd instruct the witness not to answer.

It's outside the scope of the Citywide Panel's process or the standards used by the Citywide Panel.

Q. Can service on the Citywide Panel be

1 E. EICHENHOLTZ

2 performed remotely?

3 A. Yes.

4 Q. Again, I apologize for being quiet.
5 I've got a number of questions that have been
6 answered already and I'm scrolling through
7 them to get to one that hasn't been answered.

8 To your knowledge, has any panel
9 member ever received an instruction from
10 anyone else as to how to consider any specific
11 appeal?

12 A. A specific appeal? No.

13 Q. Now, in the production of documents
14 in this case, we received an email that you
15 had sent to I think somebody else in the Law
16 Department in connection with procedures for
17 deciding certain kinds of religious
18 accommodation questions. Are you familiar
19 with that email?

20 A. I am.

21 Q. Okay. Now, have you or Mr. Sanford
22 ever sent any other email to any panelist
23 that, you know, discussed how to deal with any
24 specific or hypothetical situation arising in
25 appeals to the Citywide Panel?

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2 A. No, not that I'm aware of.

3 Q. So that's the only email you ever
4 sent to any panelist that discussed a
5 hypothetical situation?

6 A. In email? Yes, in email.

7 Q. Uh-huh. And when you say -- when
8 you distinguish email from something else, was
9 there any situation -- other than a --

10 A. Now, a hypothetical -- I apologize
11 for cutting you off.

12 Q. Sure.

13 A. Hypotheticals, as I said, sometimes
14 would be part of our broad, big-picture
15 check-in discussions. If there was a pattern
16 we were seeing or an issue, we might want to
17 talk it through as a group. Certainly that
18 was the form where we did it. Communication
19 such as emails were generally case-specific.

20 Q. And so, with respect to
21 case-specific situations, did you send any
22 emails to any panelists about how to deal with
23 it?

24 A. Procedurally? Yes. On the
25 substance, no. So we might have an agency

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2 uploading more documents, the employee
3 approaches the EEO officer and says, I have
4 more information, the EEO wants to reconsider,
5 so I might say, hold off, or, we have more
6 information for you to consider. Those sorts
7 of procedural matters generally I've been lead
8 point for the panel. So I will email panel
9 members and say, you know, this is going on,
10 so could you, you know, take another look
11 again. But I'm very conscientious that those
12 emails are kept to procedural discussions
13 because, again, I want to have the three
14 separate perspectives on every appeal and
15 everyone exercising their independent judgment
16 on the appeal.

17 MR. NELSON: I've just received some
18 communication from some of the other
19 people in the firm here that we need to
20 take a lunch break. So it's 12:30, or
21 it's 12:29, soon going to be 12:30. Let's
22 take a lunch break now. I'm indifferent
23 as to whether we take a one hour or a
24 45-minute break. I think --

25 THE VIDEOGRAPHER: Let me just go

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off.

We're now going off record. The
time is 12:29.

(Lunch recess taken at 12:29 p.m.)

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2 A F T E R N O O N S E S S I O N

3 (Time noted: 1:18 p.m.)

4 THE VIDEOGRAPHER: We're now back
5 on. The time is 1:18.

6 E R I C E I C H E N H O L T Z,

7 resumed and testified as follows:

8 CONTINUED EXAMINATION

9 BY MR. NELSON:

10 Q. Good afternoon, gentlemen.

11 A. Good afternoon.

12 Q. So, Mr. Eichenholtz, at this point
13 I'd like to introduce an exhibit, and it's the
14 part of defendants' production that was
15 labelled DEF with a number of zeros and then 1
16 and a 2 and a 3. And it appears to be an
17 email from Eric Eichenholtz dated November 30,
18 2021, and it's to someone at the Law
19 Department, and it's regarding new law agency
20 panel users. We're going to get the -- we're
21 going to ask the videographer to -- so Brandon
22 will be pulling that up. Brandon is our
23 paralegal who is part of our team who is
24 admitted to this session. So I guess we'll
25 wait for that to be pulled up by Brandon and

1 E. EICHENHOLTZ

2 then we'll ask for the court reporter to mark
3 it.

4 (Exhibit 1, Email chain of
5 November 2021, marked for identification,
6 as of this date.)

7 Q. Are you able to see that marked
8 exhibit?

9 A. Yes, I am.

10 Q. Okay, very good. Let's proceed with
11 that, then.

12 A. Oh, sure.

13 Q. Okay. So, Mr. Eichenholtz, what is
14 this exhibit, please?

15 A. This is an email exchange between
16 myself and actually two of the law panel
17 members going up from the bottom of the
18 exchange. This is when we were getting them
19 set up with the Salesforce system to be able
20 to vote, and then the chain continued into a
21 discussion about the standards to be applied,
22 and that's what the remainder of the chain is.

23 Q. So the start of this chain predates
24 the use of the Salesforce system for the
25 panel; is that correct?

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2 A. It predates these individuals voting
3 on the panel. The sort of the timeline here
4 is we added -- we had added -- we had had
5 these two individuals on the panel, but we had
6 not yet set them up and got them ready to
7 vote, and we were in the process of doing so
8 here.

9 Q. Well, were there some votes that
10 were, then, performed on the Salesforce system
11 that you have prior to November 24, 2021?

12 A. Yes, oh, yes, yes.

13 Q. Okay.

14 A. Just to be clear, not by these two
15 individuals.

16 Q. Sure. Now, the exhibit indicates
17 that you'd had verbal conversations with one
18 or more of the panelists. What was the
19 substance of those conversations?

20 A. So when these individuals were
21 brought on board to help out with the project,
22 I was telling them a little about the panel
23 and its work and the standards and sort of the
24 different sources that I wanted them to review
25 before they began voting, including the EEOC

1 E. EICHENHOLTZ

2 Guidance and the DCAS document, which you see
3 listed in this chain.

4 Q. Were there any other sources that
5 you were instructing them to view?

6 A. Not at that time.

7 Q. And is there anything inconsistent
8 with the testimony you've given so far that
9 you told them with respect to the procedures
10 and standards that they were to follow?

11 A. No.

12 Q. Did you give them any other
13 instructions in addition to the ones you've
14 told us about so far?

15 A. Yes. I explained to them how we
16 were going about dividing up the work, how we
17 would go about dividing up the work, I give
18 them instructions on that.

19 Q. In the email, one of the panelists
20 asked you for two or three examples of the
21 kind of fact pattern where the panel would
22 grant a religious accommodation, and you wrote
23 back, quote, "Given that all we see on appeal
24 is agency denials, there aren't too many,"
25 close quote. What did you mean by this?

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2 A. Precisely what I said to you this
3 morning, that we don't -- that the reversal in
4 the agency was not a particularly frequent
5 occurrence, so I had far more examples at that
6 moment of specific denials than I did of
7 grants. But I wanted to make sure if -- you
8 know, you cut that quote off mid sentence, the
9 full quote is, "Given that all we see on
10 appeal is agency's denials, there aren't too
11 many, but there are definitely some." And
12 then, I provided a specific case example. I
13 was concerned because I could not provide a
14 broader array of case examples that also
15 wanted to give, as it says in the next
16 paragraph, the general gist of the fact
17 pattern that thus far I had encountered and
18 the panel had encountered in which we would
19 approve on a religious ground, and you see
20 that described in the next paragraph.

21 Q. And why did you provide the specific
22 example that you gave to the people who had
23 addressed you in their email, and how does
24 that differ from others?

25 A. Again, these were -- these two panel

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2 users were coming in after we had sort of had
3 a big-picture orientation discussion and the
4 check-ins, so they were sort of getting caught
5 up, in a sense, and asking some questions that
6 I think we had talked through as a panel, you
7 know, previously. And so, what was happening
8 here was we'd had that sort of discussion and
9 there were these follow ups as these two -- or
10 one of the two panelists was thinking through
11 what we discussed, and in particular, I think
12 this one panelist was not clear on a couple of
13 things and wanted some clarification and
14 clarity.

15 Q. So my reading of the November 30th,
16 4:12 p.m. email from this one identified
17 panelist. It starts off, "I think it would be
18 helpful to have two or three examples of the
19 kind of fact pattern where we would," and
20 "would" is emphasized by being in italics,
21 "grant a religious RA." And I'm curious about
22 that because it sounds to me like he was
23 mostly getting instruction with respect to the
24 kinds of fact patterns where he would not
25 grant a religious, you know, accommodation

1 E. EICHENHOLTZ

2 requests.

3 What -- you know, what examples of
4 fact patterns had this panelist been given
5 before he wrote this email?

6 A. That's -- what you said is not
7 accurate.

8 Q. Well, it's certainly accurate with
9 respect to the text that I read, right?

10 A. No, no.

11 Q. I'm sorry. What was incorrect in
12 the text?

13 A. You specifically gave an explanation
14 that was your explanation as to why the word
15 "would" was italicized. That is not an
16 accurate explanation as to why he was
17 italicizing that word and the context for
18 which the panel member was italicizing that
19 word.

20 Q. So what personal knowledge do you
21 have with respect to the reason for the
22 italicization?

23 A. Having spoken with that panel
24 member, the other panel member who was on the
25 chain, and being involved in their onboarding

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process.

Q. Well, I'm sorry, but that's a -- those -- the thing you just described all would have preceded, I think, would it not, the date, Tuesday, November 30th, on which this email was sent?

A. Correct, and that's why I'm in a position to say that word "would" was not italicized for the reasons you stated in your earlier question.

Q. And did you discuss specifically with the person who sent this email why "would" was italicized?

A. Not that specific issue, but again, I was sent this email, I responded to this email, and I understand the context in which this email was sent.

Q. And so, you are making assumptions about what the word "would" means in this email?

A. No.

Q. I don't understand. You said that from the context, you were deriving meaning. But if you do it from context, then it's your

1 E. EICHENHOLTZ

2 judgment, correct?

3 A. It's my judgment. I was the
4 intended recipient. I understand what I was
5 being asked here.

6 Q. But you're not the seller, correct,
7 and you can't testify with respect to the
8 seller's intention from personal knowledge?

9 A. I believe I have the context and the
10 understanding to be able to understand what
11 was being asked here, and it was not what you
12 were saying, that the instructions that were
13 given were about how to deny reasonable
14 accommodations.

15 Q. Well, was this panelist given a list
16 of examples or a set of examples of fact
17 patterns where a religious accommodation
18 appeal would be denied?

19 A. They were given -- we went through
20 as a group, the three of us, one maybe two
21 cases that I pulled up in completely random
22 order, they were the next two cases to come,
23 and we talked them through together, as I did
24 the vote on those cases. Both of those cases
25 turned out to be denials, and that is why this

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2 question was asked, because in our discussion,
3 in our onboarding process, we'd not yet gone
4 through a case or he'd not yet seen a case
5 where there would be a grant of a religious
6 reasonable accommodation, and as he was
7 beginning his voting, he was asking for the
8 fact pattern so he could make sure that he was
9 seeing both sides as he went through the
10 process. That was my understanding of what
11 was going on here, and based on the context of
12 when it was sent and what we had done thus
13 far.

14 Q. So generally, in the instructions
15 that you were giving to the panelists and the
16 panelists were supposed to follow, what types
17 of factors would you have needed to see in
18 order to grant an application?

19 A. Generally, what you would need to
20 see is a sincerely-held religious belief that,
21 either through the belief itself or the way
22 the employee practiced the belief, would
23 conflict with the vaccination requirement.
24 That's what we were looking for.

25 Q. Doesn't the EEOC Guidance state that

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you should start by assuming that the employee has a sincerely-held religious belief rather than assuming that he or she does not?

A. Did anyone say that there was an assumption that an employee does not have a religious belief? I certainly did not.

Q. Did you -- and were you --

A. And I never -- in fact, when I review these, I presume what the employee's saying is accurate and what the employee's saying is sincere, unless I have objective facts in the record that say that that's not the case.

Q. What kind of objective facts would accomplish that result?

A. Inconsistencies. Sometimes either inconsistencies, explanations of how the employee practiced. There are a whole host of factors, I couldn't possibly list them all, because it really -- you have to review the specifics of every individualized case, and it is, you look at the entire record, you look at all these various things, and you look for that, what I described before --

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Q. So --

A. -- which is a sincerely-held religious belief which conflicts with the vaccination requirement.

Q. So what kinds of inconsistencies would you -- would the members of the panel have been instructed to view as being inconsistent with sincerely-held religious belief of that type?

A. We did not instruct people in that way. These are -- the panel is composed of knowledgeable individuals who, as I said, you can have experience in reasonable accommodations and EEO and the subject matter experience or exposure to this area, experience or exposure to appellate work, and whose job it is to review records and apply standards, especially when those standards have to be applied in a highly individualized and a highly fact-specific way.

It would, in my view, have run contrary to what the law requires us to do to have engaged overly in discussion of, well, this type of person or this type of case is

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2 always going to be a yes and this is always
3 going to be a no, because you can't review
4 these appeals and these requests in that
5 manner. So we -- that's not the way we had
6 instructed the panel to go about their work.

7 Q. So in this kind of a situation, you
8 expected each panelist to rely on the
9 panelist's prior experience and instruction
10 with respect to these kinds of issues?

11 A. Right. And as I've said previously,
12 we had discussions on trends and particular
13 issues that people find troubling that we
14 would discuss as a group during our check-ins
15 to balance the need to remain current to make
16 sure that we're all, you know, being able to
17 rely on each other in our thoughts and shared
18 experiences in a general sense, versus
19 maintaining our independent and our
20 appropriately-varied perspectives based on the
21 missions of our agencies when it comes to our
22 individual thoughts.

23 Q. Now, in your November 30, 2021
24 response to the requests made in this email,
25 you give an example of the case the appeals

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2 panel approved, a number of zeros and then
3 there's 1452.

4 RQ MR. NELSON: We would request a
5 redacted copy of this model acceptance so
6 that we have an idea of how it reads. You
7 can redact all the personal, specific
8 information about them.

9 MR. HAIDER: We ask that you follow
10 up in writing.

11 Q. Now, how are cases distributed to
12 individual panelists?

13 A. As I said, each agency handles it
14 differently. I'm aware of how each agency
15 does -- would you like me to go through each
16 one, or how would you like me to do this?

17 Q. I'll ask you to go through each one.

18 A. Okay. We'll start with law. The
19 Law Department, as I said, has five reviewers.
20 When a reviewer goes into our Salesforce
21 system, they will, generally speaking, just go
22 to the case with the lowest -- appeal with the
23 lowest case number first and work their way
24 through as many cases as they can get through
25 in the time allocated. And when another panel

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2 member comes in, they pick up from there.

3 With some exception, as I mentioned
4 earlier, you know, the New York City Housing
5 Authority people wouldn't vote on their cases.
6 You know, if I encountered a case I'd given
7 legal advice to at one time, I would leave it
8 alone and leave it empty so that it would be
9 ready for another panel member to review. And
10 we'd just go through it in that general way.

11 For the Department of Citywide
12 Administrative Services, they have divided up
13 the work using the last digit of the case
14 number. So someone gets 0, 1, and 2, someone
15 else gets 3, 4, 5, someone else gets 6, 7, 8.
16 I don't know if it's consecutive like that,
17 but they divided it up based on the last digit
18 of the case number.

19 The City Commissioner on Human
20 Rights, there's one individual who has done
21 the primary work there, and so that individual
22 does most of the voting. But when other
23 individuals have voted, they've just done the
24 same thing; they've come in and voted as
25 appropriate. And the --

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2 Q. I'm sorry. You're saying they've
3 just come in and voted as appropriate, you
4 mean on the --

5 A. Picked up the next case, right.

6 Q. Okay. Thank you. So give me your
7 answer.

8 A. Right, right, I apologize. They
9 will pick up the next case that needs to be
10 voted on. There is one exception across the
11 board to this process, in that I will on a
12 weekly basis distribute a report to the
13 committee -- to the panel on cases that have
14 two out of three votes registered, by case
15 number and by agency that needs to vote for
16 the third vote. The reason for that is
17 because we're hoping that we can move as many
18 cases to completion as promptly as possible,
19 so they may go out of order to do what they
20 call those two-vote cases so that we can get
21 more decisions out and someone doesn't -- you
22 know, two agencies very quickly vote on
23 something and someone doesn't have to wait an
24 overly extensive period of time for the third
25 agency to vote. So we will provide that

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2 information to the panel on a weekly basis.
3 We do not provide in that report how the other
4 panel members voted, obviously. Just, they
5 get a number of a case and that that agency is
6 an agency that needs to vote on the case.

7 Q. Okay. And these reports are
8 written; is that correct?

9 A. Yes.

10 Q. Okay. What other information is in
11 these reports?

12 A. That is literally it. It is a
13 series of numbers segmented by agency, and an
14 additional column for DCAS's use that allows
15 you to sort by the last number so they can
16 figure out whose cases are whose
17 responsibility. That is what the document is.

18 Q. Are there any other reports that are
19 issued, from time to time, within or by the
20 Citywide Appeals Panel?

21 A. Not within. Obviously in
22 requests -- in litigation requests and things
23 like that, like this case, we will -- the
24 attorneys will pass those along and we will
25 get the relevant documents pulled. The panel

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2 does not have the ability, including me, to
3 access the data in the database in terms of
4 downloading it. We can hear it when we're
5 reviewing a case, but I can't, for example,
6 download a series of documents or a series of
7 information. Only the Salesforce
8 administrators can do that, and then they will
9 send that to either me or litigation counsel
10 in the litigation request.

11 Q. When a denial is issued on a case to
12 the appellant, does the denial list a reason
13 for the denial?

14 A. Initially, there was no reason
15 listed on the email. Eventually, we did split
16 it up into very broad categories, and those
17 categories were listed on the emails sent to
18 both the employee, as well as the agency.

19 Q. When was that change effective?

20 A. Probably sometime in late November,
21 early December 2021, as we were sort of
22 reviewing sort of the process and how it was
23 working and talking with the Salesforce team,
24 we added that feature.

25 Q. So why did you add that feature?

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2 A. Just to allow for a bit more clarity
3 in the -- not necessarily in the email, but
4 just in the decision when it was issued, that
5 it would at least be a broad category of the
6 sort of decision that we were issuing.

7 Q. Is there any written record that
8 reflects the or explains this decision to
9 change the way in which denials were drafted?

10 A. It wasn't changing the way in which
11 denials were drafted. It was adding a feature
12 that allowed us to do some broad case
13 categories. It wasn't -- we added it to the
14 denials, but that wasn't, like, you know -- we
15 weren't like, oh, we need to change how our
16 denials were. We just wanted to have a -- for
17 a whole host of reasons, we wanted to add that
18 broad case category. There may have been
19 communications; I don't know in what medium
20 they were.

21 Q. So there may have been some
22 communications. We would like to find out, of
23 course, if there were, and if they're in
24 writing and/or if they're oral, whether the
25 writing's an email or a memo or something. Do

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2 you have any information about that?

3 A. Not as I sit here today, no.

4 Q. And were you the one who made that
5 communication, if one was made?

6 A. I honestly do not remember whether
7 it was me or whether it was someone else. I
8 remember the discussions, and I remember the
9 admission, but I don't remember who
10 communicated it to who.

11 Q. And if there was such a
12 communication that was made in writing, where
13 would we look to see a record of it or find a
14 record?

15 A. If there's something in writing, it
16 would almost certainly be via email, and so,
17 obviously, it could -- you know, if
18 appropriate and directed by my counsel, I
19 would conduct or we would conduct a search of
20 that to be able to figure that out.

21 Q. So aside from the database, is there
22 a repository of records that relate to the
23 workings of the committee -- of the panel, I
24 mean?

25 A. Just the database. Yeah, just the

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2 database.

3 Q. Does the database also contain the
4 denial and grant letters that are sent by the
5 panel?

6 A. No, the City -- it's not done in
7 such a way that the City would retain a copy,
8 you know, with respect to -- I mean, agencies
9 would receive a copy of it, but that is -- the
10 database automatically generates that email,
11 so it's not like something, someone does it
12 from Outlook and it's in a sent folder. That
13 email is generated out, and it's sent out to
14 the recipients, so the recipients would have
15 those emails.

16 Q. And no one in the City would have
17 those emails?

18 A. Well, the agencies, when they are
19 the recipients, would have those emails.

20 Q. What are the broad categories that
21 are, you know, among the choices that can be
22 put into those automatically-generated denial
23 letters?

24 A. So there's does not meet criteria,
25 there is insufficient documentation, which I

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2 would mention parenthetically is for medical
3 appeals, other, and reason meets criteria, as
4 well as failure to engage in cooperative
5 dialogue.

6 Q. How are people who received denial
7 letters that contain either the does not meet
8 criteria or the others, you know, broad
9 category listings in the denial letter, how
10 are they supposed to understand what it was in
11 their application that was deficient in the
12 minds of the appeals panel?

13 MR. HAIDER: Objection.

14 A. They would know that from their
15 proceedings before the agency. You know, that
16 is, they have engaged in cooperative dialogue
17 prior to at that point, they generally would
18 receive a denial letter notification, they
19 have interacted with the agency's EEO officer,
20 Disability Rights Coordinator, or whatever
21 agency personnel was handling their request on
22 multiple occasions, and we are providing
23 basically an affirmance or denial after
24 appellate review, and that's really all we are
25 attempting to convey in that email, is whether

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2 after appellate review, the RA's been affirmed
3 or denied -- the decision has been affirmed or
4 denied, sorry.

5 Q. So having read the complaint in this
6 matter carefully, you are aware, are you not,
7 that the complaint alleges that the denials
8 below did not contain specific reasons for the
9 rejection of the religious accommodation
10 requests?

11 A. Uh-huh. Yes, I'm aware of the
12 allegation.

13 Q. Okay. So in that circumstance,
14 isn't it the truth that if, in fact, they were
15 not aware of the reason for the rejection of
16 the application by the agency, that receiving
17 either a does not meet criteria or an other
18 designation in the appeals denial letter is
19 not going to give them any further information
20 with respect to why they were denied?

21 A. That's -- I -- there were a bunch of
22 things in there that I cannot factually agree
23 with, so I can't really answer that.

24 Q. So how are they supposed to know
25 under those circumstances why their religious

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2 application was denied?

3 A. So you're talking about, you're
4 saying a hypothetical employee who's made it
5 through the interactive -- the cooperative
6 dialogue, the interactive process with their
7 agency EEO, is aware of the agency's decision,
8 has chosen to appeal the agency's decision,
9 and is now receiving a decision on appeal, and
10 that employee has not, at any point in that
11 process, understood the basis for their
12 reasonable accommodation or why it might be
13 wanted, is what you're -- is the hypothetical
14 you're exploring? I'm not aware of a case
15 where that would have happened.

16 Q. No, the hypothetical is they're not
17 aware of why their religious accommodation was
18 denied. Not why it was wanted. Why it was
19 denied at both levels.

20 A. Right. I'm not aware of an occasion
21 where -- at least that I'm aware of, where
22 that's -- and I certainly -- if I -- you know,
23 yeah, I can't -- I just don't understand the
24 hypothetical. I'm sorry. I'm trying to, but
25 I don't.

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2 Q. And so, it's your understanding that
3 the appeals panel was not under any legal
4 obligation to provide more reasons than this?

5 A. Yes, that's my understanding, that's
6 correct.

7 Q. Are there any statistics with
8 respect to the amount of -- to the average
9 time that each panelist on the Citywide
10 Appeals Panel spends in adjudicating the cases
11 before the panel?

12 A. No, there are no such statistics.

13 Q. So no one keeps statistics of that
14 kind, so far as you're aware?

15 A. Not unless panel members are timing
16 themselves and writing it down, but I do not
17 understand that to be happening.

18 Q. And do you know whether or not the
19 CCHP or DCAS or the Department of Health and
20 Mental Hygiene, you don't know whether or not
21 they keep statistics of that kind?

22 A. No. I -- no, no. I -- I don't see
23 why they would.

24 Q. But you don't know?

25 A. I don't. I assume not, but yes, I

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2 would -- I could not tell you for a hundred
3 percent certain, as we sit here today, that
4 they did.

5 Q. Okay. Thank you.

6 A. No problem.

7 Q. Now, does the Citywide Appeals Panel
8 have a procedure for determining whether or
9 not someone is eligible to file an appeal?

10 A. You mean after we've received it?
11 Sorry, so we have an appeal before us?

12 Q. No. Some people are permitted to
13 file an appeal, as I understand it, other
14 people are not permitted to file an appeal.
15 Do you have some way of determining whether or
16 not an appeal -- whether or not a person who
17 files an appeal is eligible to do so?

18 A. I know of no circum- -- perhaps
19 there other circumstances you're thinking of
20 where someone is not permitted to file an
21 appeal?

22 Q. No --

23 A. I can't --

24 Q. Let me just name a couple of
25 circumstances.

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A. Sure. I just don't know -- I don't know what that describes. I --

Q. Sure. There are two or three -- let me just throw them out one, two, three.

A. Sure.

Q. Situation number 1 might be a person who -- from the Department of Education, for example, who attempted to file an appeal to the arbitration appeal, but they were never given an opportunity actually to speak to an arbitrator or have an arbitral decision of the appeal, and so therefore, you know, they might have been interested in filing with the Citywide Appeals Panel. That's situation 1.

Situation 2 might be those people who in another department opted to file an appeal with the arbitration panel and were denied by the arbitration panel.

Situation 3 might be that there are -- that there was a person who filed an appeal with the arbitration panel in the Department of Education, and I think did so outside the window of a few days in which they were, you know, permitted to make that appeal,

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2 and so were not -- and they got a denial based
3 on that, or perhaps they got no decision at
4 all from that arbitral panel.

5 So those are three different
6 options. If each one of these persons wants
7 to file an appeal with your panel, how would
8 you determine whether or not they were
9 eligible to do so?

10 DI MR. HAIDER: Objection. Outside the
11 scope.

12 I've been reading the topics, and
13 there's a subsequent sentence in the order
14 from the judge which states that, "A
15 plaintiff may inquire as to the Citywide
16 Panel's general practices, to the extent
17 they exist, as a foundation for acquiring
18 as to the practices applied to the
19 individual plaintiffs' appeals." The
20 scenarios of the examples that you
21 provided are not applicable here because
22 they don't apply to any of the individuals
23 in this litigation's appeal.

24 So given the order and the
25 explanation by the Court as to what the

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2 purpose of this is, these hypotheticals
3 that are posed are outside the scope, and
4 thus I instruct the witness not to answer
5 that question.

6 Q. Has anyone associated with the
7 Citywide Panel expressed a goal for a
8 percentage of the number of appeals that
9 should be granted or a limit on the number of
10 them?

11 A. No.

12 Q. And do you know by personal
13 knowledge that no one has ever done so, or are
14 you assuming so?

15 MR. HAIDER: Objection.

16 A. Based on my personal knowledge, no
17 one has done so, and my understanding, as I've
18 gone through this process, is we could affirm
19 100 percent of the appeals. That's our
20 prerogative as we review them, if the facts
21 and circumstances justified those decisions.
22 No one's ever framed this in a, oh, you have
23 to deny this amount or affirm this amount. If
24 they were all denied, if they were all
25 affirmed, as long as the panel was doing its

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2 job, the panel was doing its job.

3 Q. So what was the policy of the
4 Citywide Appeals Panel with respect to
5 applicants for religious accommodation who had
6 received vaccinations at a previous time?

7 A. There is no blanket policy. We
8 would consider that as one of many possible
9 objective facts to evaluate whether or not the
10 individual had a sincerely-held religious
11 belief that conflicted with the vaccination
12 requirement, and those facts, along with the
13 employee's explanation of those facts, could
14 be relevant to a bunch of levels of that
15 analysis.

16 Q. So what was the policy of the
17 Citywide Appeals Panel with respect to
18 employees who had experienced a religious
19 conversion and had been vaccinated prior to
20 the conversion and were no longer vaccinated
21 after the conversion?

22 A. So that is an example of what I said
23 a moment ago, right? That is an example of in
24 employee had been vaccinated, let's say,
25 throughout their life and in 2017, for

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2 example, they converted, they became a
3 born-again Christian, they converted to
4 another religion, what have you, as a result
5 of that conversion, they took on a set of
6 religious values presumably they had been
7 developing prior to that, then they have a
8 sincerely-held religious belief, and if some
9 of those values that they've explained
10 conflict with the vaccine requirement, then
11 they would be entitled to a reasonable
12 accommodation. So in that case, that sort of
13 fact would, you know, compel a grant of an
14 accommodation notwithstanding that fact that,
15 like, standing alone the fact they had
16 vaccines in the past might mitigate against
17 that accommodation.

18 Q. Now -- oh, sorry.

19 A. Sorry. One last thing. As you said
20 moments ago, you're going to review what the
21 employee said there, and obviously, you know,
22 absent some reason not to, you're going to
23 accept the employee's explanation.

24 Q. Well, and so, accepting the
25 employee's explanation, if those two facts

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2 were expressed in the application, are there
3 other factors that would, you know, reasonably
4 cause a panel member to vote to deny the
5 application, despite the fact that the person
6 had no vaccination after the conversion?

7 A. Yes. And it could be a whole host
8 of factors that either, as I said,
9 demonstrates an inconsistency, that something
10 about the employee's description may also
11 suggest that even though they haven't been
12 vaccinated, their religious beliefs that they
13 have developed after the conversion don't
14 conflict with the vaccine requirement. There
15 are a whole host of reasons that
16 notwithstanding that conversion and
17 notwithstanding the fact the employee's not
18 been vaccinated since the conversion, that a
19 reasonable accommodation might not be
20 appropriate.

21 And again, this is why when you say,
22 do you have a policy, this factual scenario or
23 not, you know, and having seen several
24 thousand now, Mr. Nelson, I can tell you with
25 certainty, there are all different

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2 permutations and combinations of these facts,
3 so it is very challenging to generalize in the
4 way you were generalizing a moment ago.

5 Q. So given all of these different
6 permutations, is there anybody who has
7 authority to restrict the ability of the
8 decision-maker of the voter to decide one way
9 or as opposed to another?

10 A. Generally, no. Absent some -- you
11 know, anything that would be a judgment call
12 is left to the judgment of the voter. The
13 check that we have on that, again, is the fact
14 that we have three agencies individually
15 reviewing these cases, right? So that if you
16 have one voter who just really reads it, maybe
17 gets the wrong feel, and the other two voters,
18 you know, seem to have a, you know, different
19 view on it, you know, that employee has a
20 chance, you know, obviously then the employee
21 would get the accommodation.

22 In order to be denied an
23 accommodation, the employee has to go through
24 at least three people who are knowledgeable in
25 the process; the agency EEO officer or EEO

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2 personnel or whoever in the agency was
3 designated to review it, the Disability Rights
4 Coordinator, for example, and two of the three
5 panel members at least. And then other
6 occasions I think that are in this case, as
7 well, sometimes it's everyone who's reviewed
8 the request has determined the RA is not
9 appropriate or is appropriate, you know, other
10 circumstances.

11 Q. Just talking about that at the
12 Citywide Appeal Panel level, supposed you have
13 a situation where you have a person who had a
14 vaccination as a child, had a religious
15 conversion, had no vaccinations after
16 religious conversion, you get one vote for a
17 grant, and you get two votes for no grant for
18 reasons that are perhaps not, you know,
19 clearly explained in the comments. You know,
20 is that a situation that is acceptable to the
21 Citywide Appeals Panel, first of all? Is that
22 an acceptable way to decide, with two to one,
23 despite the fact that you've got a religious
24 belief which is presumed or assumed to be
25 valid?

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2 A. So I'm not aware of that scenario
3 you've described ever coming up, where there
4 were two voters who had infirm justifications
5 on a record that was very clear purely at a
6 religious conversion. You know, again, it
7 would have to be had a religious conversion,
8 the religious belief conflicts with the
9 vaccine requirement in this way, and, you
10 know, and all the other factors, all the other
11 facts that are in the record point to the
12 grant of the RA, and two voters disregarded
13 that entirely -- you know, that's not
14 really -- that's a very out-there scenario,
15 from my experience working on these cases.

16 Q. Well, is it possible that -- are
17 there situations, for example, in which the
18 panel members disagree with each other,
19 without regard to whether one side wins or the
20 other side loses, whether it's a grant or a
21 denial, where it's possible that both
22 positions can reasonably be taken by the panel
23 members on the basis of the material that is
24 provided to the panel?

25 A. Yes. And, in fact, you know, I've

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2 seen every permutation and combination that
3 exists. I've seen unanimous grants, unanimous
4 denials, two to one with the different -- all
5 the various agencies at various times being
6 the two, some of agencies at various times
7 being the one, and those generally do occur,
8 as I think you succinctly stated there, in a
9 case where the factual record might -- where
10 there is support for both conclusions
11 depending on how you balance the various
12 things, if there may be some contradictory or
13 conflicting information that needs to be
14 reconciled, and that two agencies reconciled
15 it in one direction and one agency reconciled
16 it in another.

17 Q. SO it's fair to say, then, that each
18 voter has discretion with respect to the
19 decision that the person makes?

20 A. Between the bounds of the legal
21 framework and the analysis that, you know,
22 they're supposed to be applying, yes, for
23 things like, you know -- for things like, you
24 know, balancing of factors, things like
25 credibility assessments to the extent those

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2 come up with respect to objective reasons to
3 be concerned of credibility, things like that,
4 yes. The individual panel members exercise
5 that discretion as the law allows and as
6 individuals considering these requests are
7 permitted to do.

8 Q. What was the policy of the Citywide
9 Appeals Panel with respect to applicants who
10 only objected to the COVID-19 vaccine based
11 upon religious objections, but it didn't
12 object to any other vaccines?

13 A. So this is going to sound familiar.
14 There is no uniform blanket policy because
15 that is a factual determination. There can
16 certainly be a basis for granting of
17 reasonable accommodation. I'm sure if we put
18 a series of facts together, you may have some
19 ready to go, where an RA might be granted, and
20 there are many scenarios where if someone is
21 objecting solely to the COVID-19 vaccine,
22 where the RA would be denied, I think, you
23 know, there -- so there's no rule that, oh, if
24 they just said COVID, you've got to deny, or
25 they just said COVID, you've got to grant.

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2 There's no rule or policy like that.

3 Q. So again, each voter is left to his
4 or her own discretion with respect to that
5 analysis?

6 A. Yes and no. I mean, I think it's
7 not fair to say it's some, you know, shoot a
8 dart at the dartboard discretionary call here.
9 What the panel members are doing is looking at
10 the objective facts provided in the request
11 and weighing those and coming to a reasonable
12 conclusion, right? These -- you know, or if
13 they need additional cooperative dialogue,
14 there have been some cases roughly along that
15 line that you just said where you might need
16 some additional cooperative dialogue if it's
17 not in the record already. But they're
18 applying their reasoning and their judgment to
19 facts. They're not just saying, well, this is
20 the factual scenario, so it's totally up to
21 me, yes or no. They are applying the facts in
22 a reasonable manner, and if they are competing
23 facts on the record, some people, you know,
24 might -- the balance might tip one way for one
25 person, it might tip the other way for the

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other person.

Q. So among other things, you're saying that that particular scenario is not necessarily dispositive?

A. Yes. There's very -- there is -- I cannot think of something that would dispositive in all cases, and I'm sort of laughing, other than maybe someone coming in and saying, I have no religious belief that is the basis of this request. That might be dispositive. Surely no one has done that, that I'm aware of, short of that. It is, you're really looking at the record and having to look at all the different facts that are presented by it.

Q. So if an applicant was silent on whether or not he or she had taken other vaccines, was there a policy of the panel as to how that would affect the analysis of whether the person's religious objection to taking the COVID-19 vaccine was sincerely held?

A. So there was no policy of the panel. That factor would be looked at amongst --

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2 you'd have to look at the other facts in the
3 record, the information that the employee
4 provided, the circumstances presented in the
5 appeal, and make a determination as to whether
6 you want to grant or deny, or if necessary,
7 seek additional cooperative dialogue, if it
8 was felt it was needed.

9 Q. Did the Citywide Panel have a policy
10 as to how an applicant's children might affect
11 the analysis of an appellate's sincere
12 religious belief? For example, if the
13 children were vaccinated but the appellant was
14 objecting to a COVID-19 vaccine?

15 A. Again, you would consider that --
16 the panel would consider that in the context
17 of all the facts presented in the case. As I
18 sit here today, I can think of factual
19 scenarios where that might be, you know,
20 relevant and compel a grant and there are
21 factual scenarios where it might not be
22 relevant and/or it might be denied, but
23 obviously, if it's something the employee
24 offers or provides, it can be and it will be
25 considered by the panel members when weighing

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2 all those different competing facts to
3 determine whether a reasonable accommodation
4 is appropriate.

5 Q. And is the same answer appropriate
6 to the question of whether, you know, the
7 question of a situation in which an applicant
8 fails to mention whether his or her children
9 are vaccinated?

10 A. I mean, not -- no, it's not -- you
11 know, there's no implication by silence,
12 right? You know, there's no -- so yes, the
13 answer is: You look at the facts, and if the
14 fact's not there, it's one of the factors
15 you're weighing. You're not saying, oh, you
16 know, I'm going to imply through this employee
17 silence that their children are vaccinated or
18 they even have children, right? So what would
19 happen in that scenario is that would not be a
20 factor of how this person's family has been
21 vaccinated or not vaccinated when you're
22 weighing the various factors.

23 Q. Now, if a person was not scrupulous
24 in their observance of their professed
25 religious belief with respect to vaccines,

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2 would that be a basis for, a potential basis
3 for a panel number to decide against granting
4 a religious accommodation against the use of
5 the COVID-19 vaccine?

6 MR. HAIDER: Objection.

7 You can answer.

8 THE WITNESS: Okay.

9 A. It could potentially be a factor one
10 way or the other the panel would consider, be
11 considered in connection with what the
12 employee is saying and all the other factors.
13 Obviously, I think this is a good example, you
14 used the word unscrupulous. One may feel it
15 was, you know, someone just hasn't been, you
16 know, that there's -- you know, that that may
17 not be a dispositive factor in one case, and
18 depending on that record, it may be a
19 highly-relevant factor decision in another
20 case.

21 Q. Well, of course I used the words
22 "not scrupulous."

23 A. Yes.

24 Q. Rather than "unscrupulous."

25 A. Sorry. I heard unscrupulous. So I

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2 heard that through my computer. So if you
3 used "not scrupulous," I will substitute not
4 scrupulous into my answer.

5 Q. Are all the members of the Citywide
6 Panel familiar with that portion of the EEOC
7 Guidance that says that employees need not be
8 scrupulous in their observance of their
9 religious belief?

10 A. Yes.

11 Q. Okay. And in your observation of
12 the decisions that you've reviewed in your
13 quality control responsibility, have you seen
14 decisions or votes by members of the Citywide
15 Panel that rely upon the unscrupulous, if you
16 will, or not scrupulous observance of vaccine
17 objections by applicants to deny the religious
18 accommodation request?

19 A. In cases where there are a variety
20 of factors that compel denial or cause someone
21 to question the sincerity, it is entirely
22 possible that there may be an inconsistency
23 that is unexplained and does not -- and the
24 other factors that are provided by the
25 employee in the circumstances don't mitigate

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2 to a degree where one of two things may become
3 true dependent on the facts and the
4 circumstances. One, the belief may not be
5 seen as sincere, or two, that the employee's
6 practice of that particular belief does not
7 extend to the sort of practice that would
8 conflict with the vaccine requirement, but --

9 Q. And -- go ahead, please finish your
10 answer.

11 A. So I was going to say, so it's not
12 necessarily -- the conclusion there isn't
13 necessarily, oh, it's not scrupulous, right?
14 But there may be related issues where the
15 frequency or the consistency of practice
16 becomes a factor.

17 Q. Could the lack of scrupulous
18 observance of objection to vaccines be the
19 sole basis for denying religious accommodation
20 request?

21 A. There is generally -- that would
22 presume, and this is why I'm pausing here for
23 a moment, that would presume that's the only
24 thing presented either by the employee or the
25 agency on the record, and that is almost

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2 never -- you know, I don't see how that
3 would -- like, I haven't encountered that
4 situation where someone just says, I need an
5 RA because I abstained from some vaccines but
6 not others, you know, period, please consider
7 my request. That's another one of those I put
8 in the bucket of, to me, comes off as a highly
9 unusual fact pattern.

10 Q. Have you ever seen such a fact
11 pattern?

12 A. Not that -- certainly not where
13 there weren't other things to examine about
14 the employee's request beyond that statement.

15 Q. Have you seen situations in which an
16 applicant's conduct pursuant to their
17 religious beliefs has changed over time. A
18 degree of appearance, for example, that
19 increases so that one's current observation of
20 a religious belief has become more stringent,
21 even though it might be different earlier on?
22 Have you seen situations like that?

23 A. Yes.

24 Q. And how should -- does the Citywide
25 Panel have a policy with respect to how that

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2 pattern should affect the determination of a
3 voter on whether or not to grant a religious
4 accommodation?

5 A. So the employee -- so that would be
6 one of the facts that the panel members
7 consider in connection with all the facts of
8 the entire record to determine whether or not
9 the employee has a sincerely-held religious
10 belief and whether there's a conflict with the
11 vaccine requirement that could play a role in
12 that fact, could play a role in the
13 consideration, yes.

14 Q. And what about, there's a provision,
15 there's a guidance, there's a discussion in
16 the EEOC Guidance that says that, "an
17 employee's newly adopted or inconsistently
18 observed practices may nevertheless be
19 sincerely held." And to what extent have you
20 ever seen that guidance applied by a panel
21 member in supporting the grant of a religious
22 accommodation?

23 A. Well, as I think you -- you know, I
24 will just sort of echo back to you that that
25 would be applied. As the EEOC says, you can't

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2 say without looking at the entire record, the
3 new adoption of religious belief automatically
4 makes it insincere. What you would do, what
5 the panel would do in the way the panel
6 animates that, you know, I focus here on the
7 word may, they would review the entire record,
8 all the relevant facts, and make a
9 determination on the overall record, of which
10 that issue may or may not be a contributing
11 factor.

12 Q. And so, does your Citywide Panel
13 have a policy following the EEOC Guidance that
14 no one factor or consideration should be
15 determinative and that the religious objective
16 should be evaluated on an individual basis?

17 A. Finally, yes, we do have a policy.
18 And that is generally how we approach it. You
19 know, we look at all the facts, and we weigh
20 those facts. And like I said, to the extent
21 I've seen disagreements between the panel
22 members, it is usually over how the facts are
23 waived.

24 Q. So I'd like to refer again to our
25 Exhibit 1, which is the email exhibit.

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2 A. Uh-huh.

3 Q. So in that exhibit, one of the
4 panelists from the Law Department states, "I'm
5 mostly seeing folks expressing their view that
6 all COVID vaccines contain or were tested
7 using fetal stem cells and some personal
8 statements saying I've never taken vaccines
9 ever, or not since I become an adult
10 (vaccinated as an adult). My understanding
11 from our conversation is that those would not
12 constitute sincerely-held religious beliefs."

13 Do you find that text in the email?
14 Have you seen that?

15 A. Yes, I see that text.

16 Q. And that's what it says, right?

17 A. That is what it says.

18 Q. Okay. Now, it looks like this email
19 is saying that the Citywide Panel had a policy
20 that the objection that all COVID vaccines
21 contain fetal stem cells does not constitute a
22 sincerely-held religious belief. Was that a
23 policy that the panel ever had in place?
24 That's the first question.

25 A. No.

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2 Q. Is that a policy?

3 A. Yeah, no, no.

4 Q. Aside from in this email, have you
5 heard that view expressed in the course of
6 your discussions with the other panel members?

7 A. Only in this email, and it was a
8 part of what animated my response to this
9 email and my follow up with that panel member,
10 was seeing that particular comment in the
11 previous email. It showed me there was
12 confusion that needed to be clarified.

13 Q. So why didn't you clarify that in
14 your response in the email?

15 A. That is the line General Gist and
16 the fact pattern is, employee articulates
17 sincerely-held belief, has articulated how
18 they act on that belief outside the COVID
19 context, and has properly applied the belief
20 to the COVID vaccination. That was my first
21 step in doing it. You know, we had follow-up
22 discussions to this email, not via email, but
23 that was my very quick response to let him
24 know that that is -- that yes, there are
25 occasions where that would be the basis of a

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2 grant.

3 Q. Well, you didn't specifically
4 mention the objection of using fetal stem
5 cells or any of the other details that the
6 panelists wrote in the email. Why is that?

7 A. Again, because -- and I've expressed
8 this throughout this discussion, my view was I
9 was very hesitant to put any particular
10 religious belief, religion issue in a
11 particular yes or no bucket because I don't
12 think that is the way -- that shortcuts things
13 too much. And so, what I was doing more was I
14 was talking about the various factors that
15 would weigh in one direction or another.

16 Q. Well, you said you were not wanting
17 to put specific religious beliefs into one
18 bucket or other, but it seems to me that
19 this -- well, and I see in the email, it says
20 that this person's understanding was that this
21 didn't even constitute a religious belief, a
22 sincerely-held religious belief. Did you
23 unequivocally tell this person either -- it
24 would have had to have been orally because you
25 said it's not in an email --

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2 A. Right, right.

3 Q. -- that a belief with respect to
4 COVID vaccines could be a religious belief?

5 A. With respect to COVID -- you mean
6 the fetal stem cell testing?

7 Q. Yes.

8 A. Yes, if -- I wouldn't have said it
9 unequivocally because it's not an unequivocal
10 concept. There are people who oppose fetal
11 stem cells in testing and do not do so as a
12 matter of religious belief. There are
13 individuals who possess a religious belief
14 that might cause them opposition to the use of
15 fetal stem cells in testing, but nonetheless
16 their religious beliefs in their personal view
17 would permit them to take the vaccine. So I
18 would not say anyone who says fetal stem
19 cells, that's always religious, that's always
20 a yes. You have to look at the record,
21 understand what the source of the religious
22 belief is. Obviously, if the employee says,
23 I'm a Catholic and through my Catholic
24 upbringing and the teachings of the church, I
25 believe that life begins at conception, or

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2 life begins at fertilization, if that's what
3 they believe and the source of that is a
4 religious belief, and I have practiced that
5 religious belief by making sure I was never
6 even remotely connected to abortion, including
7 I will not take any vaccines that were tested
8 on cell lines derived from fetal cell lines,
9 then yes, that would be a scenario. But there
10 are a lot of pieces of that scenario that come
11 together. You can't generalize and say that
12 everyone who is opposed to the use of cells
13 derived from -- and by the way, fetal stem
14 cells, fetus that are a product of abortion I
15 think is really the key there. You cannot
16 generalize or assume, you know, absent more
17 from the employee, what the source of that
18 belief is or how it's practiced.

19 Q. Now, some of the applications may
20 have contained claims of belief that vaccines
21 actually contain aborted fetal cells as
22 opposed to being somehow, you know, derived
23 from them or being somehow perhaps tested
24 using them. And were the panel members given
25 any instructions with respect to whether or

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2 not any one of or all of those factual
3 contentions were truthful or accurate?

4 A. So we go off of the CDC Guidelines
5 and have DOHMH available to us for any medical
6 questions. My understanding and the factual
7 understanding that we've been functioning on
8 is, because we're doing this in the context of
9 the City Health Commissioner's order and the
10 City Health Commissioner has the authority to
11 make those sorts of medical determinations, is
12 that there is for, I believe, the Pfizer and
13 the Moderna vaccines, there was fetal -- there
14 were cells that were derived from fetal stem
15 cells that were a product of abortion a
16 lengthy period of time ago used in the
17 testing, and that in Johnson & Johnson it was
18 used in sort of the manufacturing, and that
19 neither actually contained those cells,
20 particularly the Pfizer and the Moderna.

21 And when we're applying facts, we
22 are going off the facts that the health
23 commissioner relied on in issuing his order.
24 One could not change those facts by saying
25 that, I do not believe the factual findings of

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2 the health commissioner to be true.

3 Q. So if a person cited something that
4 you found to be factually incorrect, was it
5 the policy of the panel that that should be a
6 count against the application for religious
7 accommodation on behalf of that person?

8 A. No, no. What would happen there is
9 we would look at all the facts and the basis
10 for the belief. What might happen there, for
11 example, if someone says, the way I practice,
12 I have a religious belief that prevents me
13 from being associated with abortion, and that
14 belief compels me to never inject cells
15 derived from an aborted fetus into my body,
16 well, these vaccines do not require that, so
17 when you review that record, absent something
18 more, there may be something more that
19 suggests a broader conflict, there would be no
20 RA there because there would be no conflict
21 because the employee could take that vaccine
22 without offending the employee's religious
23 beliefs.

24 So that's not -- I wouldn't call
25 that counting it against the employee. That's

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2 assessing the employee's own religious beliefs
3 on the terms and in the manner the employee is
4 explaining it to the agency and that we're
5 reviewing it on appeal.

6 Q. So essentially, then, under those
7 circumstances, the panelist would be
8 determining that the applicant was not
9 violating his own beliefs if he or she were to
10 be taking the COVID-19 vaccine?

11 A. No, the applicant made that
12 statement in connection with a request. The
13 panel's not making that determination.

14 Q. No --

15 A. The applicant is providing us the
16 circumstances under which there is a conflict.

17 Q. Yes.

18 A. We would be applying the applicant's
19 circumstances. We're not making any
20 determination there about the applicant's
21 religious belief.

22 Q. Well, you are making a -- if a
23 religious belief, you know, if it's expressed
24 as an opposition to taking the COVID-19
25 vaccine and it's expressed as being on the

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2 basis of a belief that the COVID-19 vaccine,
3 you know, contained aborted fetal stem cells,
4 then aren't you saying essentially that the
5 religious belief is wrong of the applicant, or
6 are you saying something else?

7 A. No, absolutely not. I'm saying in
8 that circumstance, I'm saying that the
9 employee doesn't have those -- the employee
10 has a belief that's sincerely held, they
11 practice it in a certain way, and taking the
12 vaccine is not inconsistent with how they've
13 articulated they will practice their belief.
14 There is no judgment whatsoever in that
15 scenario about the employee and their belief.

16 Q. Well, are you -- it seems to me that
17 there is, and correct me if I'm wrong, but
18 aren't you essentially the determining in the
19 course of that adjudication that a person's
20 belief that there are fetal stem cells
21 contained in the vaccine is not religious?

22 A. No.

23 MR. HAIDER: Objection.

24 A. Absolutely not. I'm -- in that
25 scenario I described, I made the following

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2 conclusions. One, that the person's objection
3 to fetal stem cells is religious in nature,
4 let's say for our hypothetical that person
5 says as a result of their Catholic religion.
6 Second, that they have a sincerely-held belief
7 that is practiced in such a manner that it
8 could potentially apply to vaccinations. And
9 third, that they've provided an explanation of
10 what practices would offend their religious
11 beliefs. And all of those things are accepted
12 is true in that scenario. There is no
13 judgment about the employee's belief there.

14 What is done is factually, it's
15 actually the judgment is on the vaccine
16 mandate. Looking factually at the vaccine
17 mandate, there is nothing that conflicts with
18 that religious belief as the employee has
19 expressed it. So there are no judgments being
20 made in that scenario about the sincerity or
21 the extent of the employee's religious belief.

22 Q. But you are making a judgement with
23 respect to the voracity of the belief --

24 A. No.

25 Q. -- to the extent that the belief

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2 includes an assertion that stem cells are
3 contained in the vaccine?

4 MR. HAIDER: Objection.

5 A. That's not a religious belief.

6 Q. I was asking. That's my question.
7 You're saying that's not a religious belief?

8 A. Yes, that's not a religious belief.
9 That's not part of the employee's religious
10 belief. The employee's believing that stem
11 cells are in a vaccine that doesn't contain
12 stem cells. That's a fact, the employee may
13 be mistaken about how -- what's contained in
14 the vaccine, there may be a misunderstanding
15 by the employee about the vaccine's
16 ingredients, but that doesn't constitute a
17 religious practice or belief when an employee
18 makes a -- you know, is applying -- is
19 describing, this is how I apply my beliefs,
20 and the vaccine mandate doesn't require the
21 employee to do something that doesn't -- you
22 know, that doesn't conflict with those
23 beliefs.

24 Q. What if the employee is basing the
25 employee's belief on -- with respect to the

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2 presence of fetal stem cells in a vaccine on
3 information or direction that has been
4 provided to the applicant by a spiritual
5 director or a clergy person of their faith?

6 A. It's not a religious belief. They
7 cannot -- an employee cannot claim a vaccine
8 contains something they don't claim. If the
9 clergy says it, if -- regardless. If someone
10 says the sky is green, that is -- you know,
11 and we know the sky is blue, then the sky is
12 blue. You know, that is not -- you can't
13 change the underlying facts of what the
14 mandate requires by having a member of clergy
15 say, well, actually the facts are different
16 than what the mandate requires. You can't --
17 there's no legal or factual basis to do
18 something like that.

19 MR. HAIDER: Mr. Nelson, if we could
20 just take a ten-minute bathroom break.

21 MR. NELSON: Sure. We'll break for
22 ten minutes. I have 2:32, but whatever
23 ten minutes is, let's take it and come
24 back.

25 THE VIDEOGRAPHER: We're now going

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2 off the record. The time is 2:32.

3 (Recess was taken.)

4 THE VIDEOGRAPHER: We're now back
5 on. The time is 2:43.

6 BY MR. NELSON:

7 Q. So, Mr. Eichenholtz, who gets to
8 make the decision as to whether or not a
9 belief is religious in nature?

10 A. "Religious in nature." It would be
11 assessed obviously in the first instance, in
12 the primary instance, at the agency level as a
13 result of the information they have, the
14 cooperative dialogue, upon consideration of
15 what the employee has advised, the information
16 the employee has provided.

17 Q. Why would it not be a matter for the
18 individual involved and his or her pastor or
19 religious leader to make that determination as
20 to whether or not it was a religious, you
21 know, bit of information or a belief?

22 A. It would be. I don't think we're --
23 I'm referring more to the process. We're here
24 talking about the process. You're absolutely
25 right, the agency is obtaining information

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2 from the employee and potentially, if they
3 provide some furnished information from the
4 employee's religious leader, and that is what
5 the agencies consider.

6 Q. So if an individual, if an employee
7 is making a religious accommodation request
8 based upon instructions the employee has
9 received from his religious leader that the
10 panel finds to be factually untrue, what turns
11 that into not being a religious belief?

12 A. It's not, not a religious -- it is a
13 religious belief.

14 Q. So, for example, taking the scenario
15 that we were discussing before, if the
16 religious leader has told the congregation to
17 which the employee belongs, the applicant,
18 that there stem cells derived from abortion
19 that are contained in all of the vaccines, and
20 that therefore, in order to be religiously
21 observant, the applicant must not take any of
22 the COVID vaccines, how can the panel be
23 empowered to determine that it's not a
24 religious belief?

25 A. That -- they wouldn't be. In this

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2 circumstance, the panel will not be
3 questioning that that is the employee's
4 religious belief.

5 Q. And so, as a consequence, what the
6 panel in that circumstance should do is not to
7 count the inaccuracy of any factual element of
8 that belief as disqualifying the person from
9 having a religious belief with respect to the
10 use of the vaccine, correct?

11 MR. HAIDER: Objection.

12 A. With respect to the determination
13 that the employee has a particular religious
14 belief, yes, that's correct.

15 Q. Okay. And so, if the panel, then,
16 decides to deny that application, the panel
17 would be requiring the appellant to violate a
18 sincerely-held religious belief; isn't that
19 correct?

20 A. No, that's not correct.

21 Q. Well, you've got a denial that
22 sanctions the person for not taking a vaccine,
23 right? The person loses his job.

24 A. A denial that -- well, the person
25 would then be subject to the vaccine mandate,

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yes.

Q. Okay. And to be subject to the vaccine mandate, a person has to take the vaccine or --

A. Correct.

Q. -- suffer sanctions, correct?

A. "Suffer sanctions"? Well, to continue in their employment, yes, they're going to have to take the vaccine.

Q. Okay. So how is that -- if granted what you just conceded is a sincerely-held religious belief, how does that -- how does a denial of the exemption application not force this person either to violate their sincerely-held religious belief or to suffer sanctions for refusal to violate the belief?

A. Because, and I think we're really getting into legal arguments which are not, quite frankly, for me to make in this context, what the panel is doing there is not denying -- or the agency and then the panel is affirming in this instance is not affirming a denial on the ground that the employee does not have a sincerely-held religious belief.

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2 Q. What would it be doing in the
3 contrary, if it is not doing that?

4 MR. HAIDER: Objection.

5 A. It's denying the -- it's not -- it's
6 making a determination that a reasonable
7 accommodation is not appropriate under the
8 facts and circumstances presented, and there
9 are a whole panoply of reasons that the panel
10 would do that, one of which is the sincerity
11 of a religious belief.

12 Q. But haven't you just conceded that
13 we're dealing with a scenario in which we have
14 a sincerely-held religious belief? They
15 couldn't under those certain circumstances,
16 given no other facts on the matter, conclude
17 otherwise, correct?

18 A. If the belief was insincere?
19 Correct.

20 Q. That it was insincere.

21 A. The panel under those circumstances
22 could not conclude the belief is insincere,
23 that is correct.

24 Q. Or that --

25 A. I mean, absent some additional

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2 circumstances, we're not talking about a
3 hypothetical. But that's not the only reason
4 a reasonable accommodation would be denied.
5 So that's what I'm trying -- you know, I'm
6 trying to answer your question to the best of
7 my ability.

8 Q. Sure. And again, I'm trying to get
9 through an outline that I have, and I'm
10 skipping over all the ones where we've asked
11 the question before, so I'm actually saving
12 you time by doing it like this.

13 So were Citywide Panel members given
14 an instruction as to how to handle
15 applications that contained objections that
16 were based upon factual beliefs about
17 vaccination that were in conflict with the
18 actual findings of the health commissioner?

19 A. They were to consider it, you know,
20 based on the facts and circumstances, applying
21 the various standards of Title VII, and make
22 the determination whether the agency had
23 properly denied the reasonable accommodation.

24 Q. So the decision they were making was
25 whether the agency had properly denied the

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2 reasonable accommodation; it was not whether
3 or not the person was entitled to a religious
4 accommodation?

5 A. Well, when we're reviewing it, we're
6 reviewing the denial. So if the person was
7 entitled to a reasonable accommodation, the
8 agency's decision would be reversed.

9 Q. Okay. So what if the facts were
10 imbalanced? What if the evaluator, the panel
11 member, found that the, on the one hand, there
12 were perhaps reasons for the denial, but on
13 the other hand, that they were equally
14 balanced by the reasons for affirmance? Was
15 there a policy of the panel as to whether that
16 should lead to a denial or a grant?

17 A. No specific policy about how one
18 would deal with something where they truly
19 believed the factors were equally balanced.

20 Q. But if the matter deemed decided was
21 whether or not the agency was justified in
22 making its determination, isn't that a
23 different determination than whether or not
24 the applicant was entitled to an
25 accommodation?

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2 A. I'm a little confused. Can you try
3 to rephrase it?

4 Q. Sure. There are -- these are two
5 different standards, are they not? One is
6 whether or not the panel, the agency below,
7 was justified, you know, had justification for
8 its decision. The other is, if you're on a de
9 novo standard, whether or not the applicant is
10 entitled to an exemption. They're different
11 standards, they have different weights. It
12 sounds to me like what you're saying is that
13 in making an adjudication of this kind, the
14 Citywide Appeal Panel members were expected to
15 deny if they felt that there was justification
16 for the agency's denial; is that correct? Is
17 that what was being done?

18 A. That -- no, I really that's not an
19 accurate description of how we go about doing
20 it and I -- yeah, that's all I...

21 Q. Where was the expectation?

22 A. There was no expectation. The panel
23 was required to review the record, which
24 included the reasons the agency gave for their
25 denial, the information provided by the

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2 employee, any information provided by the
3 agency, balance all of that, review all of
4 that, and make a determination. If they
5 determine that the reasonable accommodation
6 should have been denied, the agency's decision
7 would be affirmed. If they believed the
8 record demonstrated an accommodation ought to
9 have been granted, then they would essentially
10 reverse the agency and grant a reasonable
11 accommodation.

12 Q. Did the Citywide Panel have a policy
13 as to how to treat applications that stated
14 objections to the vaccine based upon aborted
15 fetal cells, but where the applications were
16 silent on the applicant's use of Tylenol or
17 Pepto Bismol?

18 A. No specific policy on that. An
19 employee providing us information on use of
20 medications, because at some point in the
21 cooperative dialogue either they volunteered
22 it or the agency solicited that information
23 obviously would be considered along with any
24 explanation the agency -- the employee
25 presented about whether they used or did not

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2 use those medications.

3 Q. And what would be the purpose for
4 eliciting that information about the use of
5 ibuprofen or Pepto Bismol or any other
6 medications?

7 A. To understand how the employee
8 applies his or her sincerely-held religious
9 belief concerning in that case aborted -- a
10 religious belief that concerned opposition or
11 a feeling that there was a prohibition on
12 abortion, because again, you know, you have to
13 understand not only the general category of
14 what the belief is, but how the employee
15 practices.

16 Q. So what is the relevance of the use
17 of Pepto Bismol to understanding a person's
18 religious practices?

19 A. Well, it depends on what they're
20 claim -- there may be no relevance. It
21 depends on what their particular claim of
22 their religious belief is. I think we're --
23 we've been focused recently on the idea of
24 religious opposition to fetal cells derived
25 from abortion, and there are many, many

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2 people, probably millions, who have that
3 religious opposition, would use those sorts of
4 products and would use many and all products
5 in which there was scientific testing where
6 there may or may not have been those sorts of
7 cells. That their religious practice is
8 baited upon, for example, not, you know,
9 carrying a baby to term, not engaging or
10 encouraging abortions, things like that, but
11 that is where their personal practice of that
12 religious belief ends, and that there are
13 others who will practice it differently and
14 practice it far more deeply when it comes to
15 the area relevant to the vaccine mandate. And
16 not all people -- you know, we don't
17 stereotype. Not all people who have a
18 religious belief concerning abortion believe
19 in the same things and practice their beliefs
20 in the same way.

21 Q. Why would the Citywide Panel or the
22 agencies below ask a question about Pepto
23 Bismol?

24 A. As I said, first thing, I don't know
25 why they would ask about Pepto Bismol or not.

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2 As I said, if they did and if the employee did
3 it, we would consider it amongst a variety of
4 other factors in the record to the extent
5 there's any relevance to determine it. And
6 that at the end of the day is what we're
7 doing.

8 Q. I'm sorry, but that doesn't get at
9 the nature of the question. I was asking
10 about Pepto Bismol. Why in the world would
11 anyone involved in the City's, you know,
12 determination of these questions or the
13 appeals, believe that use of Pepto Bismol was
14 somehow relevant to the sincerity of a
15 religious belief that the aborted fetal cells
16 should not be, you know, ingested?

17 MR. HAIDER: Objection.

18 A. I don't -- I don't know the answer
19 to that question. To the extent it's helpful,
20 I can tell you that I'm not aware, and I don't
21 believe there's any member of the panel who
22 has denied an appeal on the ground that an
23 employee has taken Pepto Bismol.

24 Q. And the same questions with respect
25 to ibuprofen. Why would anybody -- well, I

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2 mean, you can see -- well, first of all, let
3 me step back. I'll take that pending question
4 off the record, please.

5 You are aware, were you not, that
6 questions have been raised repeatedly,
7 frequently by the agency's below and discussed
8 in the records that you've reviewed in the
9 Citywide Appeal Panel process concerning the
10 applicant's use of Pepto Bismol, correct?
11 You're aware of that?

12 A. Yes.

13 Q. Okay. Is there some fact that
14 relates to Pepto Bismol that you think might
15 make use of Pepto Bismol relevant in any way
16 to an inquiry into the sincerity of someone's
17 religious belief?

18 A. I don't know if this is the case or
19 not, but it could be that if Pepto Bismol was
20 a product that was derived indirectly or
21 tested indirectly from abortion, aborted fetal
22 cells, it might have an analogy. So, you
23 know, an employee might say, well, I
24 understand Pepto Bismol to be this case and
25 that's why I abstain from it. You know,

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2 generally it would -- you know, as I sit here,
3 you know, I don't know. I don't know for
4 sure. I'm not looking at a specific case, and
5 I can't tell you, as I sit here now.

6 Q. Are you aware that the City Health
7 Commissioner, the former commissioner,
8 Mr. Chokshi issued a statement or a paper
9 mentioning Pepto Bismol and ibuprofen and
10 containing certain factual assertions with
11 respect to the use of fetal stem cells in
12 connection one way or another with those two
13 products?

14 MR. HAIDER: Objection.

15 A. I'm not aware of a specific paper
16 issued by the City Health Commissioner, no.
17 I -- no.

18 Q. And are you aware that the
19 commissioner had made some statements with
20 respect to that topic?

21 A. No.

22 Q. And are you aware that some of the
23 adjudicators of religious accommodation
24 requests at both the agency level and at the
25 City Appeals Panel level relied upon some

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2 assertions with respect to the use of fetal
3 stem cells in connection in one way or another
4 with Pepto Bismol and ibuprofen in
5 adjudicating religious accommodation requests?

6 MR. HAIDER: Objection. I'm going
7 to instruct the witness to limit his
8 answer to as the process of the Citywide
9 Panel --

10 THE WITNESS: Right.

11 MR. HAIDER: -- agency.

12 THE WITNESS: Thank you, counsel.

13 A. The records I've seen in the panel
14 generally -- like, what I'm trying to wrap my
15 head around is I cannot recall, as I sit here
16 today, did you use Pepto Bismol, yes or no, or
17 any discussion where it's like, someone used
18 Pepto Bismol. I remember there have been
19 questions that tended to group together
20 products such as Tylenol, Tums, ibuprofen, and
21 as I understand it, these are products that at
22 one point in their, you know, in their
23 creation, in their development, were tested on
24 cell lines that may have been derived --
25 again, I don't know if Pepto Bismol was or was

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2 not, and as I sit here today and I keep
3 thinking about it, I certainly can't think of
4 Pepto Bismol in isolation. The one that I've
5 seen most frequently is Tylenol.

6 Q. Okay. What is the relevance of
7 Tylenol, asking questions about Tylenol use to
8 the existence of a sincerely-held religious
9 belief?

10 A. Well, the first thing I want to say,
11 Mr. Nelson, is I see it in both directions,
12 correct? I see employees volunteering in
13 support, when they're -- especially where it's
14 a religious belief that's connected with
15 abortion. Seeing them affirmatively say, I
16 don't use Tylenol, acetaminophen, ibuprofen,
17 and Tums because those products have been
18 tested on cell lines that derive from
19 abortion. I do not just see it in agencies --
20 some agencies have asked that question. I do
21 not just see it from the agencies. I also see
22 it from the employees. So, you know,
23 certainly -- and I've never seen in the
24 records that I've reviewed a situation where
25 the agencies, you know, list a bunch of

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2 products and the employee said, well, I've
3 used these because, for example, I don't
4 understand these to have any connection to
5 abortion. So that's -- you know, so it's not
6 accurate to say that this is just something
7 agencies have asked and that's how I've
8 encountered it and that's how the panel's
9 encountered it in their work.

10 Q. What would the -- withdrawn.

11 Does the City have a policy with
12 respect to the manner in which a religious
13 accommodation applicant explains what a use of
14 ibuprofen despite having an objection to the
15 use of stem cells in the development of the
16 vaccines and, you know, are there explanations
17 for which -- of such behavior which the City
18 panel finds to be acceptable or not?

19 MR. HAIDER: Objection.

20 A. There's no particular policy with
21 respect to that. You know, I know employees
22 provided various explanations, and they're
23 reviewed in conjunction with the other facts
24 in the record to make the various
25 determinations that we need to make. So it

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2 would not be -- there's no specific policy as
3 to do this or do that or consider it in this
4 way or that way.

5 Q. Are you aware of any decisions of
6 the Citywide Panel that granted a religious
7 accommodation to anyone who continues to use
8 Tylenol?

9 A. Offhand, I mean, I can't recall
10 whether, you know, whether there was an
11 application that was granted where someone
12 said specifically, I use Tylenol. I couldn't
13 tell you that for certain. But like I said, I
14 can say, categorically, if someone said they
15 use Tylenol, that's not going to be a
16 guaranteed rejection of their reasonable
17 accommodation by any stretch of the
18 imagination.

19 Q. What training or information, if
20 any, did Citywide panelists receive with
21 respect to any connection between Tylenol and
22 Pepto Bismol to aborted fetal cells?

23 MR. HAIDER: Objection.

24 A. I -- we did not have any specific
25 training as to Tylenol or Pepto Bismol with

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2 respect to aborted fetal cells.

3 Q. And did the Citywide Panel rely on
4 any particular authority to support the
5 relevance of Tylenol or Pepto Bismol use in
6 determining an objection based upon abortion?

7 A. Not that I'm aware of. No one
8 particular specific authority, no.

9 Q. And did the Citywide Panel consult
10 with any expert or any scientific studies
11 about whether Tylenol or Pepto Bismol was
12 developed using aborted fetal cell lines?

13 A. My understanding is Tylenol wasn't
14 developed using aborted fetal cell lines in
15 the first instance. It was developed many,
16 many years before, but that over the years,
17 some testing, manufacturing-type work had been
18 done. That was always my understanding. No,
19 I don't think there was any specific, you
20 know -- I'm trying to think of the way to put
21 this -- a study or -- you know, obviously some
22 of the medical questions were resolved through
23 the health commissioner and the Department of
24 Health and Mental Hygiene who have expertise
25 in the public health emergency we're going

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2 through, as well as some of the medical issues
3 that were being encountered.

4 Q. So was the Citywide Panel made aware
5 that the actual development of Tylenol and
6 Pepto Bismol did not involve aborted fetal
7 cell lines, but after these products were on
8 the markets, tests were performed on them
9 using fetal cell lines?

10 A. Yes. I mean, I don't think we did
11 it in a systemic way, but certainly through
12 the records that have been reviewed, I'm aware
13 of that because it's been pointed -- you know,
14 like I said, there is a lot of assertions in
15 the cooperative dialogue both from employees
16 and from the agencies on this issue that I've
17 encountered and the panel's encountered in
18 their work.

19 RQ MR. NELSON: So, you know, we think
20 that pursuant to the requests we've
21 already made in this litigation, that we
22 should be entitled to any written
23 materials that may have been disseminated
24 to Citywide Appeal Panel members who
25 relied upon them on these topics prepared

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2 by Dr. Chokshi or wherever they came from.

3 A. Okay. That's --

4 MR. HAIDER: Objection. You can ask
5 a question, but in terms of following up
6 on documents, we can do it in writing. If
7 you have a more pointed question about the
8 existence of documents, go ahead.

9 Q. So the information that was provided
10 to Citywide Appeal Panel members with regard
11 to Tylenol and Pepto Bismol, was any of that
12 in writing, or was it orally communicated?

13 A. It was -- it was presented -- we,
14 and I'll say this again because we seem to
15 lose sight of this. The Citywide Appeal Panel
16 is an appellate body. We are not a body to
17 gather facts. Our function is not to do that.
18 We are reviewing the information that is
19 provided by the agency and by the employee
20 about the employee's -- the basis for the
21 employee's requested reasonable accommodation,
22 about the vaccine mandate, about the agency's
23 position to the extent it's relevant, we're
24 reviewing those documents, and we're
25 determining, because we're only seeing

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2 denials, whether the reasonable accommodation
3 should have been denied or should be granted.
4 That is what we are doing. It is the -- you
5 know, so no, we did not have any proceedings
6 where we were gathering facts about Tylenol or
7 Pepto Bismol or anything like that. The
8 writings we were reviewing were the records
9 that were presented to us by the employee and
10 by the employer and the assertions that were
11 presented to us by the employee and by the
12 employer.

13 Q. Did the Citywide Appeals Panel not
14 send requests to applicants for information
15 about their use of certain products, including
16 Tylenol and others --

17 MR. HAIDER: Objection.

18 Q. -- and for information also about
19 what foods or medications they abstained from
20 for religious reasons?

21 MR. HAIDER: Objection.

22 A. That's correct. We did that based
23 on the Department of Education cases, and we
24 did that based on the fact that we were trying
25 to approximate as best we could the process

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2 agencies had been using to gather that
3 information so there were inquiries in the
4 Department of Education cases that
5 approximated inquiries that we had seen from
6 other agencies. And in fact, one of the
7 reasons we asked that question in a more
8 open-ended way, the way you just described it,
9 tell us what you abstain from and why, is
10 because in our view, it was a better way to
11 allow the employee to explain their religious
12 practice or belief, because the primary
13 source, other than maybe practicing employee's
14 religious leader, if they wanted to provide
15 documentation from that, to educate us about
16 extent of the employee's religious belief and
17 the associated religious practices would be
18 the employee. So we asked the sort of more
19 closed-ended question, but we also made sure
20 that there was also an open-ended question so
21 that the employee could educate us.

22 Q. Did the Citywide Appeals Panel or
23 individual panels not also send out
24 questionnaires about using or abstaining
25 products to applicants who were not in the

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2 Department of Education, but were employees of
3 other agencies of the City?

4 MR. HAIDER: Objection.

5 A. It could be in isolated incidents in
6 other cases. Generally the inquiry we have
7 sent out is a general question of how one
8 practices their -- the cited religious belief,
9 whatever it might be, outside the -- you know,
10 outside of I don't want the COVID vaccine, so
11 that we can better understand the connection
12 between that religious practice and the COVID
13 vaccine and we can understand how the
14 employees sincerely-held personal belief does
15 potentially or does not conflict with the
16 COVID vaccine when the record isn't clear. So
17 yes, and many employees, again, you know, this
18 doesn't just come from the agencies, many
19 employees affirmatively offer that they
20 abstain from certain products and give us a
21 reason why to help, you know, the agency in
22 the first instance, but if the panel feels
23 that that was missing from the cooperative
24 dialogue and relevant, ultimately the panel,
25 after the case is remanded, to understand the

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2 nature of their practice. Because as I said,
3 you know, you need to understand whether there
4 is a conflict between the religious belief and
5 the vaccine requirement.

6 Q. Okay. But are you saying that just
7 because some of the applicants did not follow
8 the same religious beliefs of other
9 applicants, that there was to be an adverse
10 inference to be drawn from their continued use
11 of products that other people abstained from?

12 MR. HAIDER: Objection.

13 A. No.

14 Q. Well, then what is the purpose of
15 obtaining the information?

16 A. I explained that in the answer
17 previously. I'm not going to re-explain that.

18 Q. Is it not true that the Citywide
19 Appeals Panel drew adverse inferences from the
20 answers that they obtained from applicants in
21 the response to questions there concerning
22 their use of over-the-counter products, like
23 Tylenol and Pepto Bismol?

24 MR. HAIDER: Objection.

25 A. No. The panel considered various

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2 facts presented in the record, balanced those
3 facts and determined whether the employee had
4 a sincerely-held religious belief and whether
5 that religious belief was of such a nature
6 that the employee's practice with that
7 religious belief conflicted with the vaccine
8 requirement. There might be facts that
9 weighed in one favor or in the other. There
10 were no adverse inferences drawn. As I said
11 previously, the panel does not, you know,
12 imply if an employee volunteers one thing and
13 not another, and that the other thing would be
14 unfavorable. That's not, you know, how we go
15 about these reviews. And you keep trying to
16 sort of re-characterize and change the way the
17 panel reviews, and I can't answer the
18 questions when it doesn't accurately describe
19 the work that the panel is doing.

20 Q. Did anyone instruct the Citywide
21 Appeals Panel that as to whether -- I'm going
22 to withdraw that question.

23 Did anyone instruct the members of
24 the Citywide Appeals Panel as to how to
25 determine when the connection between aborted

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2 fetal cell lines in a drug or vaccine become
3 strong enough to form the basis of a sincerely
4 held religious objection?

5 A. No, because that's not what -- we're
6 not looking at the strength of the religious
7 belief at all.

8 Q. So what definition of "sincerely
9 held" do you use in reviewing religious
10 applications for accommodation, and where do
11 you get that definition?

12 A. Does the employee sincerely believe
13 what they are describing what they believe.
14 And the get that definition from the EEOC
15 Guidance and the law.

16 Q. How do you determine if an
17 applicant's beliefs are sincere?

18 A. The EEOC Guidance provides
19 generally, you will start at the place that
20 what they're saying is accurate and sincere.
21 If you start seeing facts that suggest
22 otherwise and you may choose to engage in
23 limited inquiry to test the sincerity of that
24 belief if you're starting to see those
25 objective facts, and you look at those facts.

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2 And if there are facts, you know, through
3 inconsistencies, through other factors, you
4 know, undermine the sincerity of the belief,
5 then you would find the belief insincere.
6 And, you know, you could undergo that inquiry
7 if necessary. It's certainly not always
8 necessary.

9 Q. So you used the word "accurate."
10 What role does the accuracy of a person's
11 religious belief have with respect to whether
12 or not it is sincerely held?

13 A. So, you know, I don't think I
14 described an accuracy of a religious belief.
15 A religious belief --

16 Q. "Accurate and sincere," I'm quoting
17 you.

18 A. I don't believe --

19 Q. You said, "accurate and sincere."

20 A. I don't believe I used the word
21 "accurate." I said --

22 MR. NELSON: Would the court
23 reporter please read back the --

24 A. I need to hear the context.

25 MR. NELSON: -- the question that is

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2 the last substantive question that I asked
3 and then the first two sentences of the
4 witness' response.

5 (Record read.)

6 MR. NELSON: Thank you. That's
7 enough.

8 Q. So what relevance does the accuracy
9 of a belief have to do with whether or not it
10 is sincerely held?

11 A. I don't -- I understand the court
12 reporter read back that word. There is no
13 accuracy of a religious belief. What you have
14 to look at -- oh, that's what I said, I said
15 you start at the place where you assume that
16 the religious belief is sincere, and then if
17 you start seeing objective facts that might
18 cause you to question the sincerity, you then
19 might consider in the agency, on appeal the
20 agency may have already taken this step, so
21 the appeals panel may not take it, but you
22 start -- you might do some limited factual
23 inquiry to explore that further, and then you
24 review those facts. That's how you're
25 supposed to go about it.

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2 Q. But the accuracy of the belief has
3 nothing to do with whether or not this is
4 sincere; is that correct?

5 A. That is correct. I mean, listen, I
6 don't even know conceptually how a religious
7 belief could be accurate or inaccurate because
8 it is what someone believes.

9 Q. So -- sorry.

10 A. No, go ahead.

11 Q. Is it an objective fact or a
12 subjective standard that is used to determine
13 whether or not an applicant's beliefs are
14 sincere?

15 A. You're relying on objective facts.
16 So if you don't have objective facts to
17 cause -- you know, if someone denies, you
18 know, essentially subjectively, without being
19 able to point to objective facts, that's not
20 appropriate. You need to point to objective
21 facts. And generally, in our review, I think
22 when the agency EEO officers are making their
23 determination, as well, we're looking for
24 those objective facts. It can't be, like, a
25 gut feeling or something like that.

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2 Q. Oh, okay. Who determines that a
3 religious belief cannot be a gut feeling?

4 A. No, no, no, no, no. I said "it,"
5 meaning the determination of the person about
6 sincerity, the determination of the
7 adjudicator about sincerity cannot be a gut
8 feeling. I'm not talking about the religious
9 beliefs. I'm sorry I used a pronoun there
10 and you assumed it was the other part that I
11 was referring to. I'm saying as someone -- if
12 you're analyzing whether or not a belief is --
13 the person who is analyzing whether or -- let
14 me do this to be perfectly clear: The person
15 who is analyzing whether or not a religious
16 belief is sincere cannot say it's insincere
17 because I have a gut feeling that person's
18 belief is insincere. That's what I'm saying.
19 Does that make -- does that clarify it?

20 Q. Can a religious belief be considered
21 sincere if it contradicts what other members
22 of the religion believe?

23 A. Yes.

24 Q. Can a new found religious belief be
25 considered sincere?

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2 A. Yes.

3 Q. How are panel members trained on
4 these distinctions?

5 MR. HAIDER: Objection.

6 A. Sure, okay. They're asked -- they
7 review the EEOC's Guidance which covers these
8 things, and they're asked to apply each case
9 individually based on the facts and
10 circumstances of those cases, and we have, in
11 the course of this deposition, gone through
12 many hypotheticals and scenarios that would
13 approximate some discussions, you know, a
14 check-ins, not those exact scenarios, that the
15 panel members might discuss to refine their
16 understanding, as well, as we went through the
17 process.

18 Q. So was the panel instructed to
19 characterize a belief as personal if involved
20 abstaining from substances?

21 MR. HAIDER: Objection.

22 A. I don't understand that question.

23 Q. Suppose an employee stated that they
24 ate a plant-based diet because of their
25 religious beliefs. Was it the policy of the

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2 Citywide Panel to conclude that the employee
3 was making secular, fact-based choices about
4 food as opposed to religious decisions?

5 A. No, the panel was instructed to
6 consider that fact in the context of what the
7 employee was describing as their beliefs, the
8 reasons for their beliefs, and any other
9 objective facts or circumstances in the
10 record, weigh those facts, and make a
11 determination about whether the employee had a
12 sincerely-held religious belief and whether
13 that belief conflicts with the vaccine
14 requirement.

15 Q. So if an employee stated that he or
16 she avoided painkillers, for example, or
17 alcohol or synthetic sweeteners or other
18 substances because of his or her religious
19 beliefs, was it the policy of the Citywide
20 Panel to treat such decisions as personal
21 preferences?

22 MR. HAIDER: Objection.

23 A. The policy of the Citywide Panel was
24 to consider those facts, to review what the
25 employee was saying the nature of their

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2 religious belief was, and to look at all the
3 other facts and circumstances in the record to
4 determine whether the employee had a
5 sincerely-held religious belief, and to the
6 extent the employee did so, that that belief
7 was in conflict with the vaccine requirement.

8 Q. Would it have been improper for a
9 panel to characterize abstaining from those
10 substances that I described in my last
11 question as being personal preferences rather
12 than elements of a religious belief?

13 A. No.

14 Q. From the standpoint of the Citywide
15 Panel's determinations, what difference did
16 they draw between personal preferences and
17 religious beliefs?

18 A. It depends on the facts and
19 circumstances presented by the employee, all
20 the other circumstances presented in the
21 record, and the assessment of all those facts
22 and the weighing of them.

23 Q. So, for example, what circumstances,
24 what additional circumstances would justify
25 characterizing, you know, abstaining from

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2 substance use of various kinds as personal
3 preferences as opposed to religious beliefs?

4 A. I abstain from those substances
5 because my health is important to me, without,
6 you know -- you know, just in isolation, that.
7 But again, that's why the context, the facts
8 and the circumstances of what the employee's
9 saying and why is important.

10 Q. What if the justification is, it is
11 both for religious reasons and health reasons
12 that the person's abstaining?

13 A. Then you have to look at the
14 individual facts and circumstances, see what
15 the employee's saying, you might look at other
16 facts that are presented by the employee in
17 the record and determine whether it's either
18 or a combination of both, as best you can
19 determine given the record.

20 Q. How are Citywide Panel members
21 instructed to consider appeals from employees
22 whose religious exemption requests contain
23 both religious and political beliefs?

24 MR. HAIDER: Objection.

25 A. Okay. I'll repeat this. What you

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2 do is you look at -- the panel member's
3 instructed to look at all the various facts,
4 circumstances, assertions, what the employee's
5 saying, any cooperative dialogue that was
6 held, look at all those factors, weigh them,
7 look at the objective facts, and make a
8 determination as to whether it was a religious
9 belief or political belief or a combination of
10 the two, and proceed accordingly.

11 Q. If an application cited scripture to
12 support the objection that the applicant had
13 to the use of the COVID-19 vaccine, was there
14 an instruction to members of the Citywide
15 Panel as to how to apply that fact, the
16 citation of scripture, to their analysis or to
17 an application's religious basis?

18 MR. HAIDER: Objection.

19 A. I may repeat this. If someone cited
20 to scripture to help describe their religious
21 belief, it would be considered, you know, as
22 any employee description of what their
23 religious belief or the source of the belief
24 is, and it would be considered in conjunction
25 with the other facts and circumstances

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2 presented by the employee and the agency in
3 connection with the application.

4 Q. If an employee's application
5 indicates that their religion prohibits them
6 from being vaccinated, is there any
7 circumstance under which it would be
8 appropriate for Citywide Appeals Panel to
9 conclude that the applicant's beliefs do not
10 prohibit vaccination?

11 A. Yes, if the facts and circumstances
12 of the application suggest that based on the
13 employee's description, the other facts and
14 circumstances in the application suggest that
15 there is no conflict between the vaccine
16 mandate and the employee's religious beliefs,
17 then the panel could conclude there is no
18 conflict.

19 Q. But if the person states that their
20 religious beliefs do prohibit them from being
21 vaccinated, what basis, what justification
22 could the panel have for concluding that that
23 is not the truth?

24 A. Whatever justification --

25 MR. HAIDER: Objection.

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2 THE WITNESS: Oh, sorry.

3 A. Whatever justification may exist in
4 that particular case and the facts and
5 circumstances presented by the employee and
6 reviewed by the panel. It would be highly
7 fact dependent, highly fact dependent, and
8 there's no universal answer to that.

9 Q. What possible evidence could provide
10 a sufficient basis for concluding that what
11 the applicant says is his or her religious
12 belief is not his or her religious belief?

13 MR. HAIDER: Objection.

14 A. Again, I've discussed this
15 numerous -- the first thing, that's a
16 different question than the one you asked
17 moments ago, but let's focus on that. That
18 applicant may say, this is my religious belief
19 and then describe facts and circumstances that
20 are inconsistent with that religious belief.
21 So the panel might conclude either one of two
22 things; either the employee does not have that
23 religious belief or the employee does have
24 that religious belief and it's not practiced
25 in a way that conflicts with the vaccine

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2 requirement. You know, amongst a variety of
3 other factors and possibilities that can lead
4 to that conclusion.

5 Q. Were panelists instructed as to what
6 to do if they disagreed with an applicant's
7 interpretation of religious scripture?

8 A. I cannot think of a circumstance
9 where a panel member would be placed in a
10 position to disagree with the -- you know,
11 you're talking about saying, well, they're
12 saying scripture says this, but I believe
13 scripture says something else? That would
14 never happen.

15 MR. HAIDER: Mr. Nelson, I would
16 note that, you know, we've been doing
17 close to 90 minutes of hypotheticals of
18 testimony time, and obviously, we can do
19 endless amount of hypotheticals, given how
20 fact sensitive these religious combination
21 appeals -- requests and appeals are. I
22 will just, you know, pursuant to rule 30,
23 it is approaching -- if we continue along
24 the line of hours of hypotheticals, we are
25 close to being in a manner that's

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2 unreasonably annoying. So I just want to
3 note that for the record, as we continued
4 here. And if need be, if this continues,
5 we may have to call the Court, and as you
6 know, Judge Scanlon said she's leaving
7 prior to 4:30 -- or she's leaving at 4:30.
8 So if we feel the need to terminate or
9 stop the deposition to call the Court, we
10 may, if it continues in this manner.

11 MR. NELSON: I certainly have not
12 intended to act in -- I forget exactly
13 what the word, I think "annoying" was the
14 word that you used, but that's not been my
15 intent. Every question I've asked has
16 been a legitimate question that is
17 relevant to the case and within the scope
18 of the order pursuant to which we are
19 proceeding. However, it happens that my
20 next set of questions is not hypothetical.

21 BY MR. NELSON:

22 Q. What input, if any, did the Citywide
23 Panel receive concerning hardship from the
24 Department of Buildings?

25 A. Did you say "hardship"?

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2 Q. Undue hardship.

3 A. "Undue hardship." So generally on
4 an undue hardship case, we would have some
5 sort of explanation or declination letter in
6 the file that set forth the agency's basis for
7 concluding that the reasonable accommodation
8 if granted would present an undue hardship.

9 Q. And did the Citywide Appeals Panel
10 receive any materials regarding undue hardship
11 from the Department of Buildings that was not
12 contained within an individual file sent to
13 them with respect to an individual employee's
14 application for religious accommodation?

15 A. Not that I'm aware of.

16 Q. And was information about the
17 question of undue hardship received -- oh, I'm
18 sorry.

19 Was it considered outside of the
20 individual case with respect to which it was
21 submitted to the Citywide Appeals Panel?

22 A. Generally, as an answer to that, no.
23 Theoretically if someone saw something, you
24 know, if a panel -- if there was a denial on
25 undue hardship or a panel member saw something

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2 that suggested there might be an undue
3 hardship and felt that that was a grounds for
4 affirmance, they might note that. But
5 generally, undue hardship cases involve the
6 agency providing us in the record some sort of
7 write-up.

8 Q. So are you saying that a -- I'm not
9 sure that I understand your answer. I was
10 asking about whether there was material that
11 had been contained within one appeal file with
12 respect to that subject that might have been
13 considered by a panel member in another appeal
14 with respect to which it was not contained.

15 A. Oh, no, that would not happen; that
16 would not. I mean, there -- there could be
17 information about agency operations that the
18 panel generally knows, but it would not be
19 material from one appeal file considered in
20 another appeal, no.

21 Q. All right. Then, let's go through
22 the agencies. From the police department, did
23 the Citywide Appeals Panel receive any
24 information about undue hardship, other than
25 in connection with individual appeals that

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2 were submitted?

3 A. So there are more than 5,000 --
4 individual appeals? No, no.

5 Q. I'm sorry, what is your answer?

6 A. So I apologize, I thought you were
7 saying did we categorically receive anything
8 from the NYPD about undue hardship, and I was
9 starting to explain that 5,000 appeals, then I
10 heard your qualifier that outside of
11 individual appeals.

12 No, we did not hear anything about
13 from NYPD outside of individual appeals about
14 undue hardship.

15 Q. Okay. Same question about the fire
16 department.

17 A. The fire department -- to the panel?
18 No, no. The fire department, again, the fire
19 department provides a denial letter that sets
20 forth its basis for undue hardship.

21 Q. What about the Department of
22 Education?

23 A. The Department of Education, yes, in
24 many but not all the cases, the Department of
25 Education puts in essentially an explanation

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2 when they were determining that they were
3 denying on undue hardship grounds.

4 Q. Was anything received by the
5 Citywide Appeals Panel other than in
6 connection with the individual cases, whether
7 it's in general?

8 A. No.

9 Q. Okay.

10 A. No. Outside, of course, the EEOC
11 Guidance that describes how one would analyze
12 undue hardship.

13 Q. First of all, did the Citywide
14 Appeals Panel receive any information about
15 undue hardship from any of the agencies
16 that -- you know, from which appeals were
17 taken, other than in the individual appeal
18 files?

19 MR. HAIDER: Objection.

20 A. No.

21 Q. All right.

22 A. No.

23 Q. Now --

24 A. Yeah, because -- right, if there was
25 a follow-up inquiry, it would be in the

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2 individual appeal files. So yes, no, only in
3 the individual appeals files.

4 Q. And did individual panels of the
5 Citywide Appeals Panel make inquiries with
6 respect to information about undue hardship in
7 any of the individual cases that they have
8 adjudicated?

9 A. Yes.

10 Q. Okay. In which departments did they
11 ask for this information?

12 A. I couldn't tell you categorically it
13 was always this department or that department
14 or these are the exhaustive lists of the
15 departments.

16 Q. So potentially from all departments?

17 A. Sure. It would appear in the file
18 of the appeal.

19 Q. And was any of this information
20 about undue hardship shared with the
21 individual applicants for their feedback?

22 A. No.

23 Q. And why not?

24 A. I mean, the denial letters certainly
25 were, and the applicants had the ability to

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2 respond. But the undue hardship issue, again,
3 is for the agency to describe. You know, it
4 is the agency's description of their needs and
5 how their requested accommodation would
6 interfere with potentially their needs under
7 the standards set forth in the law.

8 Q. And it's your position, it's the
9 City's position that the applicants had no
10 right to respond to the position that the City
11 was taking with respect to undue hardship or
12 to provide information to rebut what the
13 departments were saying?

14 MR. HAIDER: Objection.

15 A. No, that's not the City's position.

16 Q. Then how could they rebut or how
17 could they respond if they were not provided
18 with the information that the departments were
19 providing on the issue of undue hardship?

20 A. You're making this binary
21 distinction. I've reviewed multiple appeals
22 where the employees in the first instance have
23 asserted that there's no undue hardship --

24 Q. It is binary. You win or you lose,
25 the department fires you or you keep your job.

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2 It's binary.

3 A. Sir, we're not here to have a
4 debate.

5 MR. HAIDER: Objection.

6 A. If you have a question for me, you
7 can ask it.

8 Q. Isn't it binary?

9 A. No.

10 Q. How many outcomes are there,
11 potentially, then?

12 A. There are many outcomes on --

13 Q. So how many different outcomes there
14 could be in one of these decisions?

15 A. Well, there -- they -- there's -- an
16 accommodation can be granted, it can be
17 granted permanently, it can be granted
18 temporarily, the accommodation could be
19 denied, it can be denied for a whole host of
20 reasons and a whole host of justifications
21 depending on the facts and circumstances of
22 each case. So I mean the point of the
23 cooperative dialogue is for the employer
24 and -- the employer to assess whether or not
25 an accommodation is appropriate by engaging

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2 with the employee, by having a dialogue with
3 the employee. As I said earlier, it's not a
4 litigation proceeding, it's not, you know,
5 employee verse employer. It is the employee
6 engaging in cooperative dialogue, making a
7 determination. And with respect to the City's
8 policy, we also build into that process and
9 appeal, and that appeal is being reviewed and
10 a determination being made on appeal either
11 affirming or reversing or sometimes remanding
12 and then affirming or reversing the agency's
13 determination.

14 Q. Isn't there a possible alternative
15 conclusion also, which is that the
16 accommodation is not granted exactly as
17 requested, but in some other form?

18 A. In connection with many reasonable
19 accommodation requests, yes, that is a
20 possibility, certainly.

21 Q. How often did the Citywide Appeals
22 Panel decision result in that kind of
23 accommodation?

24 A. So I'm going to say this again.
25 What the Citywide Appeals Panel is doing is

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2 not gathering facts. They are reviewing a
3 record on appeal. In virtually all of our
4 appeals, the employees are requesting a
5 particular accommodation, they have engaged in
6 cooperative dialogue with the employer, and a
7 determination has been rendered, and we are
8 reviewing the factual record to determine
9 whether or not the decision of the agency
10 should be affirmed or reversed.

11 Q. Now, do you have any statistics with
12 respect to the percentage of times in which
13 cooperative dialogue actually was engaged in,
14 in these appeals prior to the filing of the
15 appeal at the agency level?

16 A. I mean, I can't think of a file --
17 there may be one or two where we made
18 follow-up inquiry, but I can't think of a file
19 where there wasn't cooperative dialogue of
20 some sort.

21 Q. What to you would indicate that
22 cooperative dialogue took place?

23 A. Agency solicited information from
24 employee, the employee provided information,
25 or vice versa.

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2 Q. And is that a kind of a dialogue
3 that, in your mind, results in potentially an
4 alternative -- a grant of an alternative
5 accommodation; not perhaps one that was
6 specifically requested by the applicant?

7 A. I don't think what's in my mind is
8 relevant here. You know, the law requires
9 that back and forth, and there are sometimes
10 circumstances where an agency is part of that
11 cooperative dialogue, says we can't give you,
12 employee, what we want, but we could provide
13 this alternative.

14 Q. In your observation, in what
15 percentage, approximate percentage of your
16 cases have you seen that exhibited in the
17 file?

18 A. I mean, I can't put a percentage on
19 it. Most of them, I'd say the vast majority
20 are the employee saying, I don't want to be
21 vaccinated, and I want to come to work, and
22 the employer saying, well, you -- you know,
23 basically either you're not entitled to a
24 reasonable accommodation at all, you know, or
25 this presents an undue hardship or a

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2 combination of those.

3 Q. So how many times have you seen --

4 A. In the religion.

5 Q. Now, how many times have you seen an
6 employer offer some accommodation which is not
7 exactly what was requested by the employee,
8 but that offers some less restrictive means of
9 trying to accommodate the employee's religious
10 beliefs?

11 DI MR. HAIDER: Objection. I'm going
12 to instruct the witness not to answer.

13 The agency's determinations on the
14 reasonable accommodations are not subject
15 to this 30(b)(6) testimony.

16 Q. Well, so it's your position that the
17 Citywide Appeals Panel was not in a position
18 to grant any kind of accommodation short of
19 the accommodation that was expressly requested
20 in an accommodation request?

21 A. So, Mr. Nelson, you've been telling
22 me a lot today what the City's position is or
23 is not. I think I'm here to explain that.

24 Q. I'm sorry, that was a question.
25 There was a question mark at the end of that.

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2 A. Yes, it was a statement with a
3 question mark. The answer is no, that is not
4 the City's position.

5 Q. Okay. So then the Citywide Appeals
6 Panel was empowered to consider and grant
7 accommodations that were not exactly what was
8 requested by the applicant; is that correct?

9 A. What we would do in that sort of
10 scenario, if the cooperative dialogue and the
11 review of the record suggested that that might
12 be appropriate is we would remand to the
13 agency for that sort of additional cooperative
14 dialogue. But, you know, that would require
15 to be a relevant consideration that would turn
16 on, you know -- that would be determinative on
17 whether or not a reasonable accommodation is
18 requested or denied, and I cannot think of a
19 circumstance where either the requests or the
20 cooperative dialogue were turning on that
21 issue. But, you know, again, there were some
22 certainly in the medical context that were
23 considered. But in the religious context, I
24 can't think of an example.

25 Q. Right. So you can't think of an

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2 example in which a case was sent back to --
3 remanded to the agency in a religious
4 accommodation context for consideration of
5 some alternative accommodation?

6 A. I mean, I can't think of an example
7 where it was appropriate to do so.

8 Q. What would have determined whether
9 it was appropriate or not?

10 A. If there was something -- again, if
11 the reasonable accommodation issue was turning
12 on the nature of the accommodation, there was
13 suggestion in the record that a lesser
14 accommodation would both be permissible under
15 the City's public health order and possibly --
16 you know, because we wouldn't know, possibly
17 acceptable to the employee, I'm certain there
18 could be, you know, if there was something in
19 the record that suggested that, we might
20 remand to the agency. But that's generally
21 not what these requests were about.

22 Q. Well, I'm trying to think of less
23 restrictive results that might have, you know,
24 come from application of a mandate. Did the
25 Citywide Appeals Panel ever give

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consideration, for example, to suggesting or finding or somehow ruling that being on leave without pay might permit as a condition that a person could be employed outside the agency?

A. So that --

MR. HAIDER: Objection.

A. Yeah, I mean, employees -- many employees had the ability to do so, at least in the short term. And again, I'm not thinking of requests where that's what the employee was seeking or interested in. These requests were generally for an exception to a vaccine requirement that requires the employee -- where the employee's stating they would like to continue coming to work and testing, and the employee's purpose in requesting the accommodation is they want to come to work in their existing job, so, you know --

Q. But were you aware that there was more at stake for employees, and at least in most of these agencies, than simply whether they were going to be coming to the office every day and working?

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2 A. Obviously from the employee's
3 perspective, if they were unwilling to get
4 vaccinated and were seeking an accommodation,
5 a great deal would be at stake from the
6 employee's perspective.

7 Q. Are you aware that the terms of
8 being on the leave without pay status also
9 included a rule for bidding them, the employee
10 who was on leave without pay, from working
11 outside the agency for gain, for income?

12 MR. HAIDER: Objection.

13 A. I mean, that -- not -- I don't -- I
14 have no -- no such prohibition, and there were
15 many different leave statuses at issue here
16 and I'm, quite frankly, not here to discuss
17 leave status.

18 Q. Well, you're not aware that being on
19 leave without pay, which many of these people
20 were pursuant to your, you know -- the program
21 that you designed and that other people
22 designed for the City, that they were not
23 permitted to earn outside income while they
24 were on leave without pay?

25 MR. HAIDER: Objection.

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2 A. So -- I mean, we're -- we are sort
3 of in this hypothetical world where, you
4 know --

5 Q. It's not hypothetical. It's a fact.
6 That's what these people are subject to. They
7 can't -- they have no income while they're on
8 leave without pay, and that's why things are
9 so desperate for them. If they were given an
10 option to work at McDonald's even, they might
11 be able to pay their rent.

12 MR. HAIDER: Objection.

13 Is that a question or --

14 A. Yeah, that's a --

15 Q. So why did the Citywide Appeals
16 Panel not consider other alternative means of
17 providing some accommodation to the
18 applicants, for example, to alter the
19 conditions of their leave without pay status
20 so that they could earn outside income while
21 the pandemic continued?

22 MR. HAIDER: Objection.

23 A. I understand. I will say that, as I
24 said, those considerations, at least in the
25 cases that I've reviewed, never presented

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2 themselves as, given the nature of the
3 cooperative dialogue, the nature of the
4 request, the facts underlying the request, and
5 the nature of the vaccine mandate, as the sort
6 of accommodation requests that were either
7 being sought or that were appropriate in the
8 circumstances.

9 Q. If you were giving a de novo review
10 of the cases, why did you not consider such
11 alternative grants of accommodations? Since
12 it was de novo, you should have been -- should
13 you not have been considering all the
14 different aspects of the case?

15 MR. HAIDER: Objection.

16 A. Not if there is a dispositive issue.
17 And again, this is an appellate review. So
18 this is the appeal stage. The employee has
19 had their cooperative dialogue with the
20 agency, and there is a record, and we're
21 reviewing the record for sufficiency. That is
22 our function. And in that record an
23 accommodation is sought as cooperative
24 dialogue, and we're reviewing that process and
25 the outcome.

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Q. So how many cases were denied on the basis of undue hardship?

A. I couldn't give you a number.

Q. A percentage?

A. I would -- the vast majority of denials are not undue hardship.

Q. Were there any --

A. That I've seen, that I've seen. What?

Q. Were there any appeals that were denied on the basis of undue hardship?

A. Of course.

Q. Okay. And the hardship generally consisted of what?

A. It's -- that's very fact specific. There's no general.

Q. So what hardship would it have caused the agencies that were employers of these applicants to permit them to earn income outside the agency while they were on leave without pay?

A. In- --

MR. HAIDER: Objection.

A. Indefinitely?

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2 Q. What harm would they have suffered?

3 A. I'm trying to understand the purpose
4 of that accommodation. If someone is not and
5 never willing to comply and unable to comply
6 with a mandate that's going to prevent them
7 from ever returning to the job, what would the
8 purpose of an accommodation that allows them
9 essentially to be on leave without pay from
10 the City and continue their career elsewhere
11 give them? I'm really -- this is sort of
12 getting into -- this is becoming -- you know,
13 it almost sounds like it's a
14 reverse-engineered hypothetical. Like, I'm
15 not seeing the purpose in that. You know, I
16 know that's -- I'm trying to do my best,
17 Mr. Nelson, to kind of engage with you to help
18 understand the various processes and things,
19 but I -- you -- I'm lost.

20 Q. So forgive me, but I thought that
21 the mandates were emergency orders. Is that
22 not the case?

23 A. That is the case. Well, the order
24 is borne out of a public health emergency,
25 yes.

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2 Q. And isn't every emergency order
3 limited in time?

4 A. This isn't an emergency executive
5 order.

6 Q. I'm sorry, what isn't?

7 A. This is not an emergency executive
8 order. This is a public health order of the
9 City's Health Commissioner.

10 Q. Well, aren't there both emergency
11 orders and public health orders?

12 A. Yes, there are.

13 Q. And doesn't each public health order
14 refer to, you know, a currently-existing
15 emergency?

16 A. Yes.

17 Q. And isn't every emergency, by its
18 definition, temporary in character?

19 A. Not -- I mean, certainly the
20 steps -- there is no -- yeah, I mean, yes.
21 You know, we're talking theoretically here,
22 there is obviously, and hopefully there will
23 be a point where, you know, this order doesn't
24 need to be necessary.

25 RL Q. Well, and isn't it a fact that if

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2 and when the pandemic ends, that the public
3 health order will also end?

4 DI MR. HAIDER: Objection. This is way
5 beyond the scope of this witness' purview
6 at this point.

7 We're now getting into what neither
8 the mayor or the Department of Health
9 orders when he's here to simply testify
10 about the Citywide Panel's process and the
11 standards used by the Citywide Panel.

12 So with that, I'm going to instruct
13 him not to answer that question.

14 Q. Was the Citywide Panel instructed to
15 assume that the City's public health emergency
16 would never end?

17 A. No.

18 Q. I'm sorry, did you miss the
19 question?

20 A. I said no.

21 Q. All right.

22 MR. NELSON: Okay. We're going to
23 preserve the question that I asked to
24 which you made the objection for raising
25 with the magistrate judge. We're not

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2 going to do that right now.

3 I'll just note I understand the
4 magistrate judge is leaving at 4 p.m.
5 It's 4 p.m. now. We can't raise it now
6 with her.

7 MR. HAIDER: She said she's leaving
8 at 4:30 p.m., so we can raise it, if
9 you --

10 MR. NELSON: Thank you.

11 MR. HAIDER: Oh, just to be clear,
12 do you intend on raising it? If so, we
13 ask that you raise it now before 4:30. We
14 have no plans to pause this deposition.

15 MR. NELSON: Yes, I understand. I'm
16 not going to ask it right now.

17 BY MR. NELSON:

18 Q. Did any agency provide information
19 to the Citywide Panel as to the number of
20 employees it could afford to employ without
21 causing undue hardship?

22 A. No, that's not the context of which
23 generally the agencies were borne --

24 Q. And --

25 A. -- [inaudible].

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2 (Discussion held off the written
3 record.)

4 A. I was saying the agencies, that's
5 not really the basis under which some of the
6 agencies were making their argument. They
7 were making -- you know, they were explaining
8 the necessity to have personnel present and at
9 work and the importance of the agency's
10 mission and things of that nature.

11 Q. You know, I am certain -- are you
12 certain that the agencies never mentioned an
13 inability to afford to pay employees who were
14 not working in the course of their
15 explanations of undue hardship at the agency
16 level?

17 MR. HAIDER: Objection.

18 A. It could be that they did. That
19 certainly would not be in -- a dispositive
20 inability to pay employees? That certainly
21 has never been a dispositive factor in any
22 appellate determination I've made while on the
23 panel.

24 Q. How do you know -- I'm sorry.

25 You're not referring to the votes of

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2 other panel members, however?

3 A. Right. I'm referring to -- I mean,
4 I could also include, based on our, as I said,
5 we've had discussions about undue hardship,
6 defenses and various agencies that have made
7 the assertion and denials on those grounds,
8 and certainly the ability to pay employees has
9 not come up.

10 Q. So as far as you know, that wasn't
11 an element of undue hardship for any of the
12 agencies with respect to which religious
13 accommodation or medical accommodation appeals
14 were made?

15 A. I can't --

16 MR. HAIDER: Objection.

17 THE WITNESS: Sorry.

18 A. I can't rule out that that was some
19 assertion, you know, fits that
20 characterization was made by an agency.

21 Q. And was any information about their
22 ability or inability to make payroll with
23 unvaccinated persons ever submitted in any of
24 these cases, so far as you know?

25 MR. HAIDER: Objection.

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2 A. Not that -- I've never seen any
3 document like that, no.

4 Q. Did any agency provide any
5 information as to the additional costs it
6 could afford to spend without causing undue
7 hardship?

8 A. Additional costs -- I don't -- what
9 does that mean, additional costs they can
10 afford to spend without causing undue
11 hardship?

12 Q. Yeah.

13 A. I'm sorry, I'm just -- I don't
14 understand that.

15 Q. I can --

16 A. Try to re- -- yeah, if you can
17 rephrase.

18 Q. I'm not asking a question if I
19 respond to you.

20 In context of the question, the last
21 question that I'm still asking you to answer,
22 costs are money that an agency might need to
23 spend in the context of making an
24 accommodation to a request for religious
25 accommodation.

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2 A. Right.

3 Q. So did any agency provide you with
4 any information as to those kinds of
5 additional costs that it could afford without
6 causing undue hardship?

7 A. Not that I recall.

8 Q. Okay. Did any agency provide any
9 information to the panel as to the number or
10 nature of unfilled positions it was seeking to
11 fill at any time?

12 A. Unfilled positions? It could have
13 been; I don't know. I know -- I think there
14 was some discussion of staffing of certain
15 requests. Whether those were vacancies that
16 needed to be filled or the importance of
17 maintaining proper staffing I can't
18 characterize accurately, as I sit here today.

19 Q. Was any of that information
20 considered to be relevant as to whether or not
21 the agencies would suffer undue hardship by
22 granting a religious accommodation?

23 A. I can't specifically recall whether
24 the information meeting that description was
25 made, so I certainly can't tell you whether it

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2 was relevant or not. As I said, we assess the
3 agency's explanation and generally with the
4 needs of the agency, the importance of
5 staffing, things like that.

6 Q. Did any agency provide information
7 about its capacity to work with remote
8 workers?

9 A. Generally speaking, and again, there
10 may be specific exceptions to this, but I will
11 state this as the rule, agencies that have
12 positions for which remote work is permissible
13 were not claiming undue hardship. There may
14 have been agencies that asserted undue
15 hardship in those sorts of positions, and the
16 panel would take into consideration whether
17 the described nature of the work was such that
18 maybe an alternative accommodation like remote
19 work was permissible when determining whether
20 or not, you know, it would be appropriate to
21 deny a reasonable accommodation on the ground
22 of undue hardship.

23 Q. You used the word "may" in your last
24 answer. Did the Citywide Appeals Panel ever,
25 you know, consider that, the question of the

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2 capacity of agencies to work with remote
3 workers in deciding a religious accommodation
4 appeal?

5 A. So again, now we're sort of talking
6 about two slightly different things. You're
7 talking about agency capacity, budgets, things
8 like that. I'm focused more on the nature of
9 the position the employee has, right? So an
10 agency may have a capacity for remote work,
11 but if the employee is engaged in a job for
12 which the presence at work is needed, even if
13 the agency has other positions that other
14 people believe they may be able -- they can do
15 potentially remote, it might not be a factor.
16 And that's why I say "might," because it's
17 highly dependent on the specific facts.
18 Again, as I've said so many times today, this
19 is an individualized fact-based interview --
20 process, and so it really depends on the
21 particular facts; what the employee's title
22 is, what the agency's claiming is undue
23 hardship. And we would review all those
24 things in connection with an undue hardship
25 application.

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2 Q. Did agencies provide information --
3 and this is not just to the panel directly,
4 but in any of the -- this applies also to the
5 files that they have for the individual cases.
6 Did they provide any information to the panel
7 about arrangements they have already made to
8 accommodate unvaccinated workers whose
9 accommodation requests were granted?

10 A. There may have been. I can't recall
11 any, offhand.

12 Q. Did any agencies fail to provide
13 information about their ability to accommodate
14 unvaccinated workers with remote work or with
15 work in an isolated site for unvaccinated
16 employees?

17 A. No.

18 Q. So they all provided you with that
19 information?

20 A. No, we were aware -- I can think of
21 one example in particular of an agency that
22 had provided accommodations for remote work
23 sites.

24 Q. And what agency was that?

25 A. That was the Department of

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2 Education.

3 Q. And did their provision of remote
4 work sites have any effect upon the -- did it
5 result in the grant of any accommodations for
6 a religious accommodation by the Citywide
7 Appeals Panel?

8 A. It was a factor considered in
9 whether or not to grant -- you know, to affirm
10 the denial or grant the reasonable
11 accommodation.

12 Q. What was the information that the
13 Department of Education provided to you
14 concerning remote sites for unvaccinated
15 employees?

16 A. I believe that they had given
17 teachers sort of temporary accommodations
18 working in remote work sites, you know, in
19 connection with some of their reasonable
20 accommodation cases, and the panel inquired
21 and wanted an explanation as to why the
22 employees that we were reviewing would present
23 an undue hardship on the agency. And they
24 provided the explanation, and the panel
25 members reviewed it and voted accordingly.

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2 Q. So was that information provided
3 only in connection with individual cases, or
4 was it provided to the appeals panel as
5 general information available to all the
6 members of the panel?

7 A. I don't -- we certainly made the
8 inquiry of DOE I think because whether the
9 entire panel was aware, whether it was just
10 some of us were aware that that had happened
11 and we wanted to understand the basis for an
12 undue hardship assertion and to evaluate that.

13 Q. So it may very well have been
14 provided to the panel as a whole and not
15 something to individual panelists?

16 A. I know that in our check-ins, we
17 discussed DOE and undue hardship and even the
18 fact the DOE had some people working sort of
19 temporarily offline was discussed in those
20 discussions. So we were generally aware, and
21 I know that we made inquiry of the Department
22 of Education in regards to cases that we were
23 reviewing to understand their position on the
24 undue hardship issue.

25 Q. And some of the information was

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2 provided to you in writing from the Department
3 of Education?

4 A. Yes. The writings were submitted
5 in -- the inquiry and the writings were made
6 in individual cases, and I think eventually,
7 you know, the inquiry almost became, like, a
8 standard inquiry, and they would give us the
9 writing in appropriate cases. You know, there
10 were cases the DOE did not assert an undue
11 hardship position, and they didn't give us a
12 writing in those cases.

13 RQ MR. NELSON: Well, so we are going
14 to be requesting copies of any writings
15 that reflected or constituted any of that
16 information from the DOE regarding the
17 remote sites.

18 Q. Did the DOE ever tell you whether
19 their remote sites were filled to capacity?

20 A. I don't think we asked about that,
21 whether they were filled to capacity or not.

22 Q. And you didn't --

23 A. We didn't ask.

24 Q. -- information about it?

25 A. Not that I am aware of.

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2 Q. And why didn't you ask about the
3 extent of their capacity remaining?

4 A. Because it was for DOE to explain to
5 the panel why DOE was asserting an undue
6 hardship in these individual circumstances.

7 Q. At what time did the Department of
8 Education first provide you with this
9 information about its remote site capacity?

10 A. Again, I don't think DOE provided us
11 the information. I think we were aware that
12 there had been people, you know, who were
13 assigned to remote sites through the
14 reasonable accommodation process, and we
15 wanted to understand what their position was
16 with respect to the appeals that we were
17 reviewing, and they provided us in each
18 individual case that they were asserting undue
19 hardship, the DOE that is, the DOE provided us
20 with an explanation for that assertion.

21 Q. When did you first obtain that
22 information?

23 A. Again, the DOE filed that
24 information into Salesforce, either
25 contemporaneously with other documentation or

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2 separately, when the panel was considering
3 various DOE appeals.

4 Q. So did you -- did the panel consider
5 that in connection with all DOE appeals?

6 A. No. As I said moments ago, there
7 were cases where DOE did not make any
8 assertion that they were denying on undue
9 burden grounds, and in those cases or those
10 appeals, there was nothing in the record to
11 support -- undue hardship, sorry, undue
12 hardship grounds, and in those cases there was
13 nothing -- you know, if there was a case where
14 there was nothing in the record to support
15 undue hardship, then there was nothing in the
16 record to support undue hardship and you
17 focused on other inquiries.

18 Q. Did any agencies in the -- either in
19 the individual files or outside of those
20 files, the appeal files, state that individual
21 plaintiffs or employees -- I'm sorry, not the
22 individual plaintiffs, I can't inquire about
23 that.

24 Did any employees state that their
25 employees posed a direct threat to others if

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2 they remained employed?

3 A. Yes, there were employees who
4 asserted specifically a direct threat, and
5 then there was, you know, the health
6 commissioner's order that said that given the
7 nature of the public health emergency, that
8 only vaccinated individuals, with the
9 exception of those who demonstrated that they
10 were entitled to a reasonable accommodation to
11 be without vaccination, should be present at
12 City work sites.

13 MR. HAIDER: Mr. Nelson, I'd just
14 ask to take another ten-minute break.

15 MR. NELSON: Okay. We'll come back
16 in ten minutes.

17 THE VIDEOGRAPHER: Going off record.
18 The time is 4:17.

19 (Recess was taken.)

20 THE VIDEOGRAPHER: We're now back
21 on. The time is 4:30.

22 MR. NELSON: Thank you. Gentlemen
23 and ladies, toward the end of the
24 deposition I'm going to be surrendering
25 the mic to my co-counsel, Sujata Gibson,

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2 who has some very specific kinds of
3 questions, lines of questions, not very
4 long that she's going to be asking. And I
5 just wanted to let you know in advance so
6 it's not some sort of a surprise. But,
7 you know, we're definitely going to get
8 this done within the seven hours that
9 we're allowed for the deposition, so no
10 need to worry about that.

11 BY MR. NELSON:

12 Q. So my first question, I want to just
13 follow up on, and who knows, maybe -- well, I
14 want to follow up on a line of questioning I
15 was asking before.

16 Are the panelists, like, provided
17 with one or more objective criteria which
18 would determine whether an exemption request
19 ought to be granted or denied by itself?

20 A. No.

21 Q. There's none, okay.

22 Now, how many agencies made a claim
23 that granting a religious accommodation would
24 cause a direct threat to anyone?

25 A. Correction is the only one that

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2 stands out as we sit here today.

3 Q. Did they make that in 100 percent of
4 their cases or something less?

5 A. I'm not sure.

6 Q. I'm sorry?

7 A. I'm not sure.

8 Q. Oh, you're not sure. Thanks.

9 A. Yeah.

10 Q. All right. I didn't hear the --

11 A. Sorry, yeah I'll get a little
12 closer, yeah.

13 Q. And was it in most of the files that
14 they sent you or less than half?

15 A. I can't remember. It was in many of
16 the ones that I reviewed.

17 Q. And what about the other agencies?
18 Did any of the others raise the claim of a
19 direct threat?

20 A. Not -- again, I can't recall an
21 example with another agency.

22 Q. Did the Citywide Appeals Panel deny
23 any appeals on the basis that the appellant
24 would have caused a direct threat?

25 A. Can the caveat that I, you know,

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2 that maybe that I'm either not aware of or
3 haven't seen, I cannot think of a single
4 example that was denied on -- of a reasonable
5 accommodation request that was denied on
6 direct threat and affirmed solely on the issue
7 of direct threat.

8 Q. So there may have been some that
9 would have been affirmed partially on the
10 basis of direct threat?

11 A. Again, at least that I've seen, I
12 haven't seen where someone's focused -- a
13 panel member has focused on the direct threat
14 issue in their notes about their affirmance.

15 Q. So insofar as you know, the direct
16 threat issue was not a basis for any
17 affirmances from any department?

18 A. As far as I'm aware, yes. But there
19 may be, and they would be, you know, indicated
20 in the particular case.

21 Q. And what, if you recall, was the
22 basis for the Department of Corrections claim
23 that direct threats existed from the granting
24 of religious accommodation to employees?

25 A. I don't recall offhand, I don't

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2 recall offhand.

3 Q. Okay. Do you recall whether there
4 was any objective or scientific, you know,
5 analysis that was provided in support of the
6 Corrections Department's assertion that a
7 direct threat existed?

8 A. As I said, I don't remember
9 precisely what the explanation was.

10 Q. Okay. Thank you.

11 So one presumes -- and again, this
12 is not a question, but a preface to a
13 question. One presumes that the City is
14 concerned that unvaccinated people may get
15 COVID-19 and spread it. So that's the
16 predicate, that's the assumption that I'm
17 stating, and I have a question: Can
18 vaccinated people get COVID-19?

19 DI MR. HAIDER: Well, objection. I'm
20 going to instruct the witness not to
21 answer.

22 He's here to be -- you know,
23 questions that should be directed at a
24 medical professional or someone similar.
25 Again, subject to Citywide Panel's process

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2 in reviewing beyond the standards of the
3 Citywide Panel. So I'm going instruct the
4 witness to not answer that question.

5 Q. So in considering undue hardship
6 requests, has the Citywide Appeals Panel or
7 any of its individual panels considered
8 whether it makes any difference to the
9 spreading of COVID-19 whether an employee is
10 vaccinated or unvaccinated?

11 MR. HAIDER: Objection.

12 You can answer.

13 A. Yeah, as I said, I don't remember
14 the particular rationale. You know, obviously
15 I'm aware of the various rationales of the
16 vaccine and their effectiveness and it might
17 play a role in depending on the agency's
18 explanation. But to say here it played a role
19 in this way or this way, I can't say.

20 Q. So is there a finding on the part of
21 the panel or any individual panels that it
22 makes a difference whether unvaccinated people
23 spread COVID-19 in any greater extent than
24 vaccinated people do?

25 A. The purpose of --

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2 MR. HAIDER: Objection.

3 THE WITNESS: Sorry.

4 A. The purpose of the panel is not to
5 gather facts and make a determination in the
6 first instance. It's to review the record
7 presented to it on appeal that has follow-up
8 inquiry in any particular case, to engage in
9 follow-up inquiry to make sure that it has all
10 the facts it needs to decide an appeal.

11 Q. But isn't it true that on occasion,
12 in cases where applicants present discussions
13 of their own religious beliefs and other bases
14 for their religious accommodation, that the
15 Citywide Appeals Panel considers whether the
16 basis is valid or true or accurate?

17 A. Yes, and also whether -- I mean, I
18 wouldn't say that -- you see, that's --
19 you're -- sort of there are two things that
20 are getting mixed up, and we kind of got mixed
21 up on this before. There's a difference
22 between validity of a religious belief,
23 whether a religious belief has a conflict with
24 the COVID-19 vaccine mandate, the factual
25 issue as to whether, we talked about this

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2 before, whether the refusal to vaccinate or
3 the desire not to vaccinate comes from a
4 religious source or a secular source or a
5 political source. Those are all three
6 separate issues that may come into play in any
7 given case.

8 Q. Okay. Well, when considering those
9 issues, those questions of, for example,
10 accuracy and that sort of thing, why do you
11 not also consider the question of the accuracy
12 of whether there is a difference -- whether it
13 makes a difference to exclude unvaccinated
14 people from employment?

15 MR. HAIDER: Objection.

16 You can answer.

17 A. So there are factual findings
18 that -- you know, there's a factual basis for
19 the mandate that is basically that there is a
20 necessary public health benefit to employees
21 engaging in the actions contained in the
22 health commissioner's order that has been
23 challenged and upheld, and so we are reviewing
24 these requests in that context. Reasonable
25 accommodations are not a vehicle to challenge

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2 the underlying health order. It is a vehicle
3 to -- for legal -- on specific legal bases to
4 request expectations in that order. One of
5 those bases is not personal, factual
6 disagreement with the findings of the health
7 commissioner.

8 Q. So do any Citywide Panel conduct an
9 independent undue hardship analysis in
10 considering whether or not a sincere religious
11 accommodation might be accommodated offsite or
12 remotely?

13 MR. HAIDER: Objection.

14 A. The Citywide Appeal Panel is doing
15 appellate-type work. They do not in the first
16 instance gather fact. We may have factual
17 inquiries that we direct off into the agency
18 or the employee, as appropriate, and ask them
19 to provide the facts to us that we need to
20 make our determination. We are making our
21 determination based on the record developed on
22 appeal.

23 Q. Isn't there a contradiction between
24 saying you are making your determination on
25 the -- based on the record that was developed

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2 on appeal, that is to say, the record that
3 comes to you from the agency on the one hand,
4 and then to say that, you know, if there are
5 questions that you think require additional
6 information, you go out and ask the agency for
7 them, or you ask the applicant for it? Aren't
8 those two statements in contradiction?

9 A. No.

10 Q. How can that be?

11 A. Because they're not.

12 Q. Well, all right. Either you're
13 deciding it on the basis of -- well,
14 withdrawn.

15 So the materials that you solicit
16 from the agencies, those are not materials
17 that are contained in the record on appeal; is
18 that correct? The record that --

19 A. They are -- they are part of the
20 record when we make our determination on the
21 appeal, yes.

22 Q. But they are not part of the record
23 that was sent to you by the agency at the
24 start of the appeal?

25 A. Right, because we've made a

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2 determination that we want to remand for
3 further development of the record and we have
4 done so.

5 Q. Okay. So the additional information
6 is always done on remand?

7 A. Well, again, functionally, yes,
8 that's how this works. We make an inquiry of
9 the agency, either on rare occasion directly
10 to the employee, but generally, the agency to
11 either provide us an explanation or get
12 information from the employee, to review it,
13 and to submit it to augment the record.

14 Q. You just used the word "remand."
15 Are you saying that you are giving the case
16 back for a fresh consideration for its own
17 decision to the City agency, or are you saying
18 something else?

19 A. We are sending it back, and when
20 information is provided, there are occasions
21 where the agency will advise the panel that
22 when it obtained the information, it
23 determined that the reasonable accommodation,
24 in fact, should be granted, and at that point,
25 we close our appeal administratively because

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2 we do not review appeals of grants of
3 reasonable accommodations.

4 Q. How often has that been done, how
5 many times?

6 A. I couldn't give you a number. I
7 would certainly -- yeah, I couldn't give you a
8 number.

9 Q. And do -- withdrawn.

10 Is there any written communication
11 or document that sets forth, like, the terms
12 of the remand, including that the agency may
13 reconsider its decision before sending it back
14 to you?

15 A. No, no. Usually what happens is
16 there is a communication agency, the panel is
17 interested in this information in any
18 particular case, and the agency will provide
19 our response -- its response to the panel, and
20 we'll proceed from there.

21 RQ MR. NELSON: So we're going to want
22 to see procedure, in connection with our
23 procedural request for information on
24 copies of such communications made to each
25 agency that received at least one of those

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2 things that you call a "remand."

3 MR. HAIDER: We'd just ask that you
4 follow up in writing.

5 MR. NELSON: Okay.

6 Q. Now, when you informed the agency
7 that you are doing this thing that you call a
8 "remand," do you provide any similar notice to
9 the applicant?

10 A. So again, we are an appeals panel.

11 Q. Yes.

12 A. The entity that is doing the
13 interaction with the applicant is the agency;
14 not the appeals panel. There have been
15 circumstances, they're rare, that we will
16 directly communicate with the applicant for a
17 variety of reasons, you know, exceptional
18 reasons is what I'll call it. But generally,
19 the interaction is because that is their
20 function, through the agency and its EEO
21 office. Our function is to review these
22 matters on appeal.

23 Q. So does the applicant even have any
24 knowledge, typically, that the matter has been
25 remanded to the agency for further development

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2 of the record?

3 A. It would have to because the agency
4 EEO officer or someone in the agency is
5 reaching out to the employees and requesting
6 information, and sometimes they may say, the
7 City Appeal Panel wanted us to ask or wants to
8 know, sometimes they say, we need to know
9 this. But the employee is notified that the
10 information is needed in considering with
11 their RA request.

12 Q. So you never remand a case unless
13 the information you want is coming from the
14 applicant?

15 A. No. As I said, we've had ones where
16 we've made inquiries to both the applicant and
17 the agency, but it is very -- you know, it's
18 rare that we would have specific follow up for
19 the agency because it's generally outside of
20 the context of something like undue hardship,
21 you know. We really need to understand the
22 nature of the request from the applicant; not
23 the agency.

24 Q. Are there times when you are
25 requesting information from the agency; not

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2 from the applicant? Have there been such
3 instances?

4 A. Exclusively the agency? I can't
5 recall any, offhand.

6 Q. Were individual panels that were
7 confronted with undue hardship claims from the
8 agency involved in an appeal, were those
9 panels expected to attempt to verify that the
10 hardship claimed by the agency existed?

11 A. No, they were expected to review the
12 explanation of the agency and look at the
13 facts in the record and assess whether the
14 agency had established an undue hardship.

15 Q. So what level of evidence was the
16 agency required to provide to the appeals
17 panel to meet that standard?

18 A. The agency was required to
19 articulate what about its needs and operations
20 was causing an undue hardship.

21 Q. Were they able to provide any
22 evidence that that was true?

23 A. I don't -- certainly if there was
24 inconsistencies in the agency's statement that
25 required further inquiry or suggested that it

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2 was untrue, we would have followed up. You
3 know, and certainly in circumstances where the
4 description doesn't seem to match the nature
5 of the job the employee's doing, there may
6 have been some follow up in those cases, as
7 well. But no, they're not required -- no one
8 in this process is required to -- you know,
9 it's put to a burden of evidentiary proof.
10 You know, it's all about assertions and, you
11 know, information that is generated as part of
12 the cooperative dialogue.

13 Q. But it seems to me it isn't true
14 that no one is required to provide evidentiary
15 proof because there very clearly is a burden
16 on the applicant to provide evidence to
17 support their claim that they have a religious
18 objection. Why is -- I mean, you would agree
19 with that statement, wouldn't you?

20 A. No, I would not agree with that
21 statement.

22 Q. Okay. The religious applicant is
23 not required to provide any evidence?

24 A. That's -- I mean, not in a -- in
25 a -- you know, in an evidentiary backup,

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2 burden of proof way. The requirement is that
3 the employee articulate their religious belief
4 and explain what the belief is, the source of
5 the belief, and the conflict between the
6 belief and the vaccine requirement. It could
7 simply be the employee saying so.

8 Q. But isn't it a fact that normally,
9 in such a case, the employee is also required
10 to respond to specific questions that are
11 addressed to the employee, and if the response
12 is not sufficient, then there's a denial of
13 the application?

14 DI MR. HAIDER: Objection. Again, this
15 is outside the scope.

16 We're now talking about what an
17 agency is supposed to do rather than what
18 the Citywide Panel does in reviewing the
19 appeal through the agency and where the
20 standards apply.

21 So I would instruct the witness not
22 to answer.

23 MR. NELSON: That's actually not
24 true though because what I'm dealing with
25 here is the inconsistent standards that

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2 the appeals panel has with respect to
3 evidentiary requirements. They require
4 evidence of the applicant for an
5 exemption, but they require no evidence of
6 undue burden, if it's asserted by the
7 agency.

8 MR. HAIDER: Well, I think it was
9 phrased in a different way. You can go
10 ahead and ask it, if it's phrased with
11 respect to the Citywide --

12 THE WITNESS: Well, I -- yeah,
13 sorry. Okay.

14 MR. HAIDER: Can you phrase the
15 question?

16 BY MR. NELSON:

17 Q. Isn't it a fact that you do not
18 require evidence from the agencies with
19 respect to any claims that they make of undue
20 hardship?

21 A. No. Like I said, there's no
22 evidentiary requirement of any participants in
23 cooperative dialogue here. There are many
24 cases where it will simply be the employee
25 explaining their needs and the basis for their

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2 accomodation and the agency explaining their
3 needs.

4 Q. Again, I'm trying to eliminate
5 questions that we've written, so I'm saving us
6 time by being quiet for a moment.

7 A. I understand. Thank you.

8 Q. Were panelists instructed to assume
9 that any or all of the agencies that had
10 denied religious accommodation requests had a
11 compelling interest of any kind?

12 A. I don't understand -- I'm not
13 familiar with the term "compelling interest"
14 in this context.

15 Q. Are you aware that the term
16 "compelling interest" is used in the context
17 of the application of the United States
18 Constitution's First Amendment to situations
19 of religious discrimination?

20 MR. HAIDER: Objection.

21 THE WITNESS: Yeah.

22 DI MR. HAIDER: I'm going to -- you're
23 calling for a legal response to a question
24 about, you know, First Amendment, which
25 has not been testified as a standard

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2 that's applicable here.

3 So I'm going instruct the witness
4 not to answer.

5 Q. So did the individual panelists have
6 any instructions with respect to whether or
7 not to consider alternative accommodation
8 possibilities?

9 A. If the record -- well, I can't
10 recall if there are -- other than the guidance
11 that they were provided, that they reviewed, I
12 can't recall any specific discussions on
13 alternative accommodation possibilities at the
14 panel level.

15 Again, you know, I want to be extra
16 clear as often as I can that we are really
17 talking about half, and I don't even want to
18 say "half," but the final phase of the
19 reasonable accommodation process, the
20 post-determination phase of the reasonable
21 accommodation process. So what may have been
22 appropriate at other phases, you know, we're
23 not really, you know, here to discuss. But,
24 you know, in terms of the panel, we did not
25 get records where the cooperative dialogue

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2 really went too deeply into that issue.

3 Q. So the, as you stated, the Citywide
4 Panel was governed not only by Title VII, but
5 also by the New York State and New York City
6 Human Rights Laws. To what extent did the
7 panel actually implement the requirements of
8 the New York State and New York City Human
9 Rights Laws?

10 A. It wasn't charged with implementing
11 those laws, it was charged with applying the
12 standards necessary to review an appeal of the
13 denial of a reasonable accommodation under the
14 framework of federal, state, and city law.

15 Q. And that would have included the New
16 York State and City Human Rights Laws,
17 correct?

18 A. As I just said, federal, state, and
19 city law.

20 Q. Right, okay. So what is the
21 standard for -- what do you understand the --
22 sorry, I'm sorry.

23 You stated previously that in
24 consideration whether or not an undue hardship
25 existed for the agency to grant a religious

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2 accommodation, that the City or the agency was
3 required to show more than a de minimus cost
4 or burden on their operations from the
5 granting of such an accomodation. Do you
6 recall that testimony?

7 A. That's correct.

8 Q. How much more?

9 MR. HAIDER: Objection.

10 A. Again, this is actual inquiry that
11 we review in every case. We have to see
12 sufficient level of disruption to agency
13 operations and justification for why the
14 reasonable accommodation would present an
15 undue burden to the particular agency, when
16 we're considering undue burden.

17 Q. So the standards that the -- I'm
18 sorry.

19 Were express instructions ever given
20 to the members of the individual panels with
21 respect to the exact standards that they were
22 to apply with respect to determining if
23 there's an undue burden?

24 MR. HAIDER: Objection.

25 A. With respect to the COVID-19 vaccine

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2 requirement and health emergency, the panel
3 was directed to the EEOC Guidance, and as I
4 said earlier, my understanding was, given the
5 nature, the emergent nature of the pandemic,
6 the City Commission of Human Rights, which is
7 the agency charged with enforcing the human
8 rights law, adopted that guidance, so we felt
9 that that was the guidance that those agencies
10 that are, unlike the Citywide Panel, charged
11 with implementing those laws were directing us
12 to.

13 Q. Did the Citywide Panel routinely
14 request from agencies that were having an
15 undue hardship from granting an accommodation,
16 did they routinely request from those agencies
17 information about the identifiable cost of the
18 accommodation request, and including the costs
19 of loss of productivity and of retaining or
20 hiring employees or transferring employees
21 from one facility to another in relation to
22 the size and operating cost of the employer?

23 MR. HAIDER: Objection.

24 A. So again, as I've said, the agencies
25 provided the justification for asserting undue

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2 hardship, which was factually reviewed in
3 every case in which it was asserted by the
4 panel members, and a determination rendered as
5 to whether or not they had established an
6 undue hardship under the standards set forth
7 in the guidance.

8 Q. Did the Citywide Appeal Panel
9 specifically examine whether or not the
10 information that I identified in my last
11 question had been provided by the agency
12 employers?

13 MR. HAIDER: Objection.

14 A. So again, you know, I'll try and
15 explain this as best I can, that that is the
16 agency's, you know -- the agency is doing that
17 when they are assessing the employee's request
18 for reasonable accommodation. On appeal, we
19 review the material that was provided to us by
20 the employee and the agency and make a
21 determination on appeal whether the
22 accommodation was denied, properly denied, or
23 should have been granted based on the facts
24 and circumstances presented to us by the
25 agency and by the employee.

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2 Q. Does the civil -- oh, I'm sorry.

3 Does the Citywide Appeals Panel
4 routinely examine whether or not the materials
5 provided by the agency employer in connection
6 with the file from their denial of the
7 religious accommodation includes information
8 concerning the identifiable cost of the
9 accommodation, including the costs of loss of
10 productivity and of retaining and hiring
11 employees or transferring employees from one
12 facility to another in relation to the size
13 and operating cost of the employer?

14 MR. HAIDER: Objection.

15 A. Again, the various factors, costs,
16 etcetera, pertinent to a reasonable
17 accommodation is made during the cooperative
18 dialogue and the review of the employee's
19 request by the agency, the Citywide Panel
20 receives the information provided by the
21 employee and by the agency, reviews that
22 information and makes a determination as to
23 whether the reasonable accommodation was
24 properly denied, or if it was not, whether the
25 reasonable accommodation should be granted.

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2 Q. And so, in effect, your answer to my
3 last question is no?

4 A. No, that is not accurate.

5 Q. So, again, I will ask a question
6 that is designed to produce the same
7 information that I did not receive in response
8 to the last several questions.

9 Does the Citywide Appeals Panel
10 routinely examine whether or not the record on
11 appeal provided by the agency that claims
12 undue hardship has included information about
13 "the identifiable cost of the accommodation,"
14 and this is statutory language I'm reading,
15 "including the costs of loss of productivity
16 and of retaining or hiring employees or
17 transferring employees from one facility to
18 another, in relation to the size and operating
19 costs of the employer"?

20 A. So again, the way the reasonable
21 accommodation process works is those facts are
22 reviewed by the agency, they engage in a
23 cooperative dialogue with the employee, and
24 they make a determination. The information
25 the employee provided and the explanation of

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2 the agency is submitted to the Citywide Appeal
3 Panel, and the Citywide Appeal Panel will
4 decide on appeal whether the agency's
5 determination to deny the reasonable
6 accommodation was appropriate, and if it
7 wasn't appropriate, whether it's appropriate
8 to grant the reasonable accommodation.

9 Q. So in reviewing a decision to deny a
10 reasonable accommodation on the basis of undue
11 hardship, is it the case that the Citywide
12 Appeals Panel does not consider it
13 dispositive, whether or not the record on
14 appeal contains information provided by the
15 agency employer about "the identifiable cost
16 of the accomodation, including the costs of
17 loss of productivity, and retaining or hiring
18 employees or transferring employees from one
19 facility to another, in relation to the size
20 and operating cost of the employer"?

21 A. There does not need to be -- the
22 employer is providing us the explanation for
23 why they believe they have an undue hardship.
24 In making those determinations, they consider
25 the factors they necessarily need to consider

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2 for their operations, and that either is or is
3 not reflected factually in their summary and
4 their explanation that they provide us, and we
5 can take that into consideration as needed
6 when making our determination on appeal.

7 Q. So are you aware that the language
8 that I've repeatedly cited here is contained
9 in the New York State and New York City Human
10 Rights Laws in context of whether or not an
11 undue burden has been sufficiently
12 demonstrated?

13 A. I'm well aware of that, yes.

14 Q. Okay. Then why does the Citywide
15 Appeals Panel not bother to consider whether
16 or not that criteria has been met in a claim
17 of undue burden by the agencies?

18 A. Your --

19 MR. HAIDER: Objection.

20 THE WITNESS: Sorry.

21 A. Your characterization is incorrect,
22 and I'm not going to engage in argument. This
23 is legal argument, and I'm not going to
24 entertain it. If you have a factual question,
25 I'd be happy to answer a factual question.

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2 Q. Does the Citywide Appeals Panel
3 consider to be dispositive in adjudicating
4 appeals from agency employers based on undue
5 hardship, whether that file contains
6 information about the number of individuals
7 who will need the particular accommodation to
8 a sincerely-held religious observance or
9 practice that is involved in that appeal?

10 A. Do we consider that dispositive? We
11 consider the explanation the agency provides
12 as to why there's an undue burden. That is
13 what we consider, and we look at the facts
14 that are generated by that and our
15 understanding of those facts in connection
16 with what the employee is claiming the facts
17 provided by the employee, and the panel will
18 make an appellate determination from that
19 point forward.

20 Q. So same question about whether or
21 not the appeal file contains information from
22 the agency employer for an employer with
23 multiple facilities about the degree to which
24 the geographic separateness or administrative
25 or fiscal relationship of the facilities will

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2 make the accommodation more difficult or
3 expensive.

4 A. I know of no legal requirement that
5 requires at the appellate phase of a review
6 that that sort of assessment be provided at
7 that level of detail. What we are getting on
8 appellate review from both the employee and
9 the employer is an explanation as to why an RA
10 is appropriate, an explanation as to why the
11 RA may have been denied on reasons, including,
12 but not limited to, undue hardship, and we
13 assess that. There is no requirement,
14 statutory or otherwise, that the employer,
15 that the agency, that the City -- the City's
16 internal appeal process specifically provide
17 that sort of data. What they need to do is
18 explain their justification for undue burden.

19 Q. So I'm going to ask about some
20 factors that are listed in the New York City
21 Human Rights Law concerning how an undue
22 hardship is to be explained by an employer,
23 and ask you whether or not this list of
24 factors is expressly considered by the
25 Citywide Appeals Panel in making its

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determinations on undue hardship cases where the accommodation has been denied on the basis of undue hardship.

So that list is as follows: Nature and cost of the accomodation; the overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed in such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of a facility; the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number type and location of its facilities; and the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness; administrative or fiscal relationship of the facility or facilities in connection to the covered entity.

A. So we would of course review any

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2 requests for an undue hardship asserted by the
3 agency with an understanding that those are
4 some of the factors that the agency is --
5 should be looking at when making its
6 determination that a particular accomodation
7 requires an undue hardship.

8 Q. Does the Citywide Panel require
9 evidence that the agency employer has, in
10 fact, provided information or obtained
11 information or relied upon information of this
12 kind?

13 A. Again, we are -- the panel does
14 not -- the panel reviews the assertions of the
15 parties from the cooperative -- not "parties."
16 The employer and the employee in a cooperative
17 dialogue determine whether the reasonable
18 accommodation is granted or should be denied,
19 outside of -- there's some requirement
20 obviously for documentation in the medical
21 context. There was no specific evidentiary
22 rule or showing that is required on an appeal
23 of the employer or of the employee. That is
24 not how the appeal process works. The appeal
25 process is reviewing the record and the

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2 assertions of the employer and the employee of
3 why the accomodation is necessary and why it
4 was denied in determining whether or not the
5 accomodation was properly denied and whether
6 the accomodation should be granted based on
7 the facts presented to the panel in that
8 record. And if we need more information, if
9 there is a particular aspect of the
10 explanation that we might need information
11 about one of those particular elements that
12 one might need to consider, we can certainly
13 make inquiry of the agency and have done so.

14 Q. But the Citywide Appeals Panel is
15 basically not required to determine whether or
16 not the agency employer has complied with the
17 New York State Human Rights Law or the New
18 York City Human Rights Law. Is that a fair --

19 A. Yeah, and to do this, to engage in
20 this kind of back and forth, you know, I think
21 we need -- you know, and it's not my role here
22 to have a legal discussion with you about what
23 the law requires, what the law requires
24 someone to show at certain stages of the
25 process, and so I'm not going to dig into

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2 that. I've explained what the panel looks
3 for, I've explained how we go about looking
4 for it. I don't think there's more factual
5 information I can provide, other than what
6 I've already provided.

7 Q. So when assessing whether or not it
8 would be an undue hardship to accommodate the
9 Department of Education employees, does the
10 Citywide Panel consider the fact that there
11 are only 30 accommodated Department of
12 Education employees working remotely at the
13 department's workspace in Brooklyn at 1087
14 Ocean Avenue and that it can accommodate 312
15 employees?

16 MR. HAIDER: Objection.

17 A. To the extent that that fact would
18 be relevant to a determination in any
19 individual case, we would consider that.

20 Q. Has the panel ever considered that
21 evidence?

22 MR. HAIDER: Objection.

23 A. Again, I think right -- you know, I
24 can't answer that without really discussing
25 the facts and circumstances of an individual

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2 case. I certainly would not say that it is a
3 dispositive factor on the issue of undue
4 hardship, that there may be seats available in
5 any given facility or desks available or what
6 have you. It would not necessarily be a
7 dispositive factor.

8 Q. When assessing whether or not it
9 would be an undue hardship to accommodate City
10 employees, did the Citywide Panel ever
11 consider whether it would constitute an undue
12 hardship on the employing agencies to modify
13 their termination descriptions so that they
14 might be eligible to collect unemployment
15 insurance?

16 MR. HAIDER: Objection.

17 A. I don't know if that came up in any
18 cooperative dialogue. I can't say here for
19 certain.

20 MR. NELSON: All right. We have
21 some other questions that are going to be
22 posed by Sujata Gibson, but we need to
23 take a short break before that begins.

24 This is -- you know, we have -- I guess we
25 have -- I'm not sure exactly how much more

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2 time we have.

3 But where are we on the time spent
4 so far? I'm asking the videographer.

5 THE VIDEOGRAPHER: You have
6 29 minutes left.

7 MR. NELSON: Thank you.

8 So let's take a short break, another
9 ten minutes, please, and we'll -- sorry,
10 go ahead.

11 THE VIDEOGRAPHER: We're now going
12 off record. The time is 5:16.

13 (Recess was taken.)

14 THE VIDEOGRAPHER: We're now back
15 on. The time is 5:27.

16 EXAMINATION BY

17 MS. GIBSON:

18 Q. Mr. Eichenholtz, I wanted to follow
19 up on some of your direct threat comments.
20 The first was, you stated that you don't want
21 to second guess the commissioner's mandate.
22 Where did the mandates say that unvaccinated
23 employees with religious and medical
24 exemptions cannot be accommodated without
25 posing a direct threat to others?

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2 A. It doesn't. To the contrary, it
3 specifically contemplates that those who have
4 religious and medical exemptions to the -- to
5 the vaccination requirement can be at the
6 workplace, I believe with certain conditions,
7 obviously.

8 Q. Thank you.

9 And you also said that Corrections
10 was the only department, that you're aware of,
11 agency, that did provide any kind of analysis
12 on direct threat. Isn't it true that they
13 provided no scientific support with that?

14 A. Again, as I said earlier, I don't
15 remember the precise explanation that the
16 Department of Correction provided regarding
17 direct threat.

18 Q. But is it fair to say that other
19 than their conclusory statements, they didn't
20 provide any citations to science or anything
21 evidentiary to support their assertion that
22 there could be a direct threat based on
23 vaccination status?

24 A. Ms. Gibson, I can't give you a
25 characterization when I don't remember

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2 precisely what it says.

3 Q. Okay. I was looking through the
4 discovery materials, and the FDNY didn't
5 provide any direct threat analysis, but said
6 there could be a potential for a direct
7 threat. Would you consider that as persuasive
8 evidence to uphold an undue hardship
9 determination?

10 A. As I --

11 DI MR. HAIDER: Objection.

12 You know, Ms. Gibson, I know you're
13 referencing discovery materials particular
14 to one of the plaintiffs, which is, you
15 know, not permitted in this deposition.

16 Even though it's posed as a
17 hypothetical question, I'm going direct
18 the witness to not answer that question.

19 MS. GIBSON: Well, I'm not going to
20 accept that. The FDNY put a policy
21 statement out for all FDNY employees about
22 the potential for undue hardship, and I'm
23 not going to accept in a deposition not
24 answering a question, so we reserve the
25 right to bring this back up with the

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2 Court.

3 Q. I would ask again: If the FDNY put
4 out a potential, as they did, potential undue
5 hardship without any individualized review of
6 an individual person and why they would pose a
7 direct threat, would you uphold that as an
8 undue hardship determination?

9 MR. HAIDER: Objection.

10 You can answer.

11 A. Yeah, I know of no circumstances
12 where the Citywide Panel was provided an
13 explanation of direct threat without other
14 information that allowed for some
15 individualized understanding of the particular
16 employee, such as job title, job location, and
17 the like, elsewhere in the record.

18 Q. Did the Citywide Panel ever uphold
19 undue hardship determinations for anyone else
20 than DOE employees?

21 A. Yes.

22 Q. And you say that none of these
23 agencies, other than Department of
24 Corrections, ever provided any information
25 about direct threats?

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2 A. Not that I recall, no.

3 Q. So how could you have an undue
4 hardship determination based on fear of COVID
5 spread without a direct threat analysis?

6 A. I'm not aware of an undue hardship
7 determination based on fear of COVID spread,
8 as you've characterized that. Yeah, I --

9 Q. Well, the basic premise --

10 A. I can't answer that question, yeah.

11 Q. You said that the mandates do not
12 say that these employees cannot be reasonably
13 accommodated, correct?

14 A. Yes, if they're entitled to
15 accommodation under the parameters set forth
16 in the law, yeah.

17 Q. Okay. Thank you.

18 But so how, then, would it be an
19 undue hardship to accommodate any of these
20 employees if they were not a direct threat to
21 others?

22 A. Because the nature of the -- the
23 mandate and the nature of their job is such
24 that they cannot be taken offline -- I mean,
25 I'm not quite sure with this -- how you're

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2 saying it's -- you know, the -- there are
3 individuals and agencies that require physical
4 presence in the workplace, and there is -- and
5 there are people who work with vulnerable
6 populations and things like that, and that
7 would obviously be relevant to a direct threat
8 analysis. It's also relevant to an undue
9 hardship analysis in appropriate
10 circumstances. That doesn't mean that one
11 needs to prove the other. You know, I
12 understand that may be your legal position.
13 I'm not sure we see eye to eye on the law
14 there.

15 Q. I'm trying to understand your
16 position. So my -- I guess let me dial this
17 back.

18 Does anything in these mandates,
19 specific mandates covering these plaintiffs,
20 does anything in these mandates state, if
21 accommodated for religious or medical
22 concerns, these employees cannot be physically
23 present at the workplace, as a blanket rule?

24 A. If accommodated? If an
25 accommodation is granted, they can be

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2 physically present subject to certain
3 conditions that I don't want to misstate
4 because I don't have the order in front of
5 me --

6 Q. Okay. But just to clarify, the
7 mandate does not say they cannot be
8 accommodated by allowing them to remain at
9 work with sincere religious objections,
10 correct?

11 A. Correct. It says --

12 Q. Okay.

13 A. -- that --

14 Q. So unless they were a direct threat
15 to others, there's no reason why, if they were
16 found to have sincere religions objections,
17 they couldn't continue at their job, correct?

18 A. No, because their requested
19 accommodation may pose an undue hardship.

20 Q. Only if they're a direct threat,
21 though, right?

22 A. No, that's not correct. I
23 understand that is your legal position, I
24 think --

25 Q. Well, why else?

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A. -- that is a legal argument, and I'm not here, respectfully, to argue the law. I'm here to provide you facts about the Citywide Appeal Panel and its processes.

Q. And the Citywide Appeal Panel granted multiple undue hardship claims, correct?

A. That's correct.

Q. So I'm asking you: If it's not based on a direct threat analysis, what possible reason could there be if somebody is not a direct threat, what possible reason could there be for undue hardship?

A. Because granting the reasonable accommodation in the context of that employer, employer, they're based on the functions and the operations, will cause a significant enough disruption that it constitutes an undue hardship under the law.

Q. How, if they're not a direct threat, would that be true?

A. Because the granting enough accommodations can impair the function of an agency, granting particular accommodations in

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2 particular functions can impair the agencies,
3 and there may be some, as I said to you,
4 Ms. Gibson, I'll say it again, there may be
5 some facts that go into the undue hardship
6 analysis that are similar to those that we
7 might think of in the direct threat analysis.
8 But that doesn't mean that the direct threat
9 is a prerequisite to undue hardship. Again,
10 that is a legal argument you are making, and
11 I'm not here to debate the law.

12 Q. Mr. Eichenholtz, I'm asking for your
13 explanation of how anybody -- how it would be
14 an undue hardship. If they are not a direct
15 threat and they can be accommodated in their
16 current job physically present, how is that an
17 undue hardship absent a direct threat
18 analysis?

19 A. Because the agency articulates that
20 granting that accommodation, either alone or in
21 a certain amount, will impair the agency's
22 operations, and there could be a way that
23 having unvaccinated personnel poses a certain
24 amount of risk. This is a slightly different
25 issue, we're looking at a different area of

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2 the law here when we're talking about undue
3 hardship, that might also factor in to the
4 potential disruption to the agency's
5 operations, if that accomodation is granted,
6 so --

7 Q. What kind of threat would not be
8 part of a direct threat analysis?

9 MR. HAIDER: Objection.

10 A. Again, the fact -- I keep saying
11 this, and I understand it's your legal
12 argument, and once again I --

13 Q. Please stick to the question I'm
14 asking you. I'm just asking you: What type
15 of threat would not be part of a direct threat
16 analysis?

17 A. What type of --

18 Q. What type of risk?

19 A. Okay. Obviously risk is a very
20 important part of direct threat analysis --

21 Q. Yes. What type is not -- if you're
22 saying direct threat is irrelevant, I'm -- you
23 cannot be a direct threat, but you can still
24 pose an undue hardship because of the risk you
25 pose. Why -- what possible type of risk would

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2 not be part of that direct threat analysis?

3 A. That's not what I said, Ms. Gibson.

4 Q. Okay. I'm going move on.

5 So have you relied on any documents
6 at all, any science, anything, any evidence at
7 all to establish that the risk that these
8 employees posed because of their vaccination
9 status is substantial?

10 MR. HAIDER: Objection.

11 You can answer.

12 A. Risk because of their vaccination
13 status is substantial?

14 Q. Yes.

15 A. Again, this is sort of completely
16 divorced from any context, and you're talking
17 about me personally --

18 Q. Could you -- I would direct you to
19 just answer the question: Is there any
20 evidence at all that you relied on, let's
21 start with -- actually I'm going to
22 rephrase -- no, I'm going to stick with the
23 original question.

24 A. Okay.

25 Q. Any evidence at all that you relied

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2 on to determine that unvaccinated employees
3 with sincere religious beliefs pose a
4 substantial risk to others based on their
5 vaccination status?

6 MR. HAIDER: Objection just to the
7 form as to what he relied on or as to the
8 panel relied on.

9 MS. GIBSON: Well, that's a good
10 distinction, and I do want to clarify.
11 And I would ask, Mr. Haider, to continue
12 to clarify the reasons for your objections
13 if you can so that I have a chance to
14 respond.

15 Q. So both. Did you rely on any
16 evidence, and to your knowledge, did the panel
17 rely on any actual evidence to establish that
18 unvaccinated employees could pose a higher
19 risk to others based on their vaccination
20 status?

21 A. So as I said earlier, in the appeals
22 that I've reviewed, I've never affirmed an
23 appeal on the basis of direct threat. I have
24 affirmed on the basis of undue hardship.

25 Q. I think as yes or a no would be

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2 great. Have you ever relied on any evidence
3 for that determination?

4 A. What's "that determination"? That's
5 where I'm confused, Ms. Gibson. I'm not
6 trying to be difficult. I'm just trying to
7 understand what you want to know from me.

8 Q. Okay. Have you ever assessed the
9 duration of the risk that an individual might
10 pose to others using evidence?

11 A. In my lifetime?

12 Q. In these panel proceedings, have you
13 or the panel ever looked at the duration of
14 the risk an individual might pose based on
15 their vaccination status?

16 A. So, and I think I explained this
17 earlier, this is done in a context that
18 includes a public health emergency order that
19 has a factual predicate, and so we work off of
20 that factual predicate and --

21 Q. Did you rely on any evidence to make
22 the determination on the duration of the risk
23 that an individual might pose for an undue
24 hardship analysis?

25 A. Again, I will repeat again, I have

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2 not affirmed denials of reasonable
3 accommodations on the grounds -- specifically
4 the grounds that they present -- oh, I'm
5 sorry, undue hardship. On the grounds -- you
6 know, on the direct -- on the undue hardship
7 grounds, I have looked at the potential
8 disruption to agency operations if the
9 reasonable accommodations were granted, and
10 there could be a multitude of reasons for
11 those.

12 Q. Were any -- again, you haven't
13 answered my question. Did you rely on any
14 evidence for those determinations?

15 A. We've had this conversation with --

16 Q. For your undue hardship
17 determinations, did you rely on any evidence?

18 A. My function in the panel is not to
19 gather --

20 Q. I would ask that you say yes or no.

21 A. -- evidence.

22 I'm trying to explain to you why I
23 can't answer it yes or no. So it is -- it is
24 challenging because you're using terms like
25 "you," which I can't even tell whether you're

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2 asking me personally, you're asking the panel,
3 you're asking the whole reasonable
4 accommodation process. You know, we're here
5 to discuss what the Citywide Panel does, and
6 you're asking me what I would do without
7 really an explanation as to -- I'm trying to
8 explain to you why this is so confusing to me.

9 Q. You trained the panel, correct?

10 MR. HAIDER: Objection.

11 A. No.

12 Q. Who trained the panel?

13 A. I mean, I -- as I said, the panel
14 was given, you know, the guidance and things
15 like that, and we've had group discussions and
16 there's, you know, the City Commissioner's on
17 the panel. So we do it collaboratively.

18 Q. Okay. But you wrote the FAQ?

19 MR. HAIDER: Objection.

20 A. No.

21 Q. You participated in writing the FAQ?

22 A. Yeah, I reviewed it. I reviewed the
23 draft.

24 Q. With how many other people?

25 A. As I said earlier, I cannot tell you

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2 the specific people, but the agencies would
3 have been the Department of Citywide
4 Administrative Services, as well as the City
5 Commission on -- I mean, I'm sorry, not "City
6 Commission"; the Office of Labor Relations.
7 Sorry, it's getting late.

8 Q. And people came to you for advice on
9 how to handle -- what the standards were and
10 the criteria that they were supposed to
11 employ, correct?

12 MR. HAIDER: Objection.

13 A. No, that's not correct.

14 Q. So those emails to you were random?

15 A. No. That -- they were -- so that
16 was -- Ms. Gibson, I'm really lost. So
17 generally, I was not -- the guidance we were
18 given comes from the EEOC policy. That was a
19 request from a City panel to explain what was
20 going on. I was not the source of the
21 guidance, you know, as --

22 Q. Why --

23 A. I would talk with panel members and
24 the panel would talk directly about the issues
25 we were dealing with.

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2 Q. So just to clarify, neither you nor
3 the City Panel, to your knowledge, was given
4 any evidence, beyond conclusory statements, to
5 support undue hardship or direct threat
6 analysis?

7 MR. HAIDER: Objection.

8 A. I -- no, I wouldn't agree with that
9 characterization.

10 Q. Okay. So what evidence were you
11 given to support a direct threat or an undue
12 hardship determination?

13 A. I can't answer that question in that
14 generalization. I've tried to explain the
15 framework and the context in which we've
16 decided these cases.

17 Q. Mr. Eichenholtz, there are either
18 documents or there are not. What I'm trying
19 to determine is whether we need to make a
20 request for these documents or not.

21 Did you or the Citywide Panel, to
22 your knowledge, rely on any documents,
23 evidence or documents, to support your undue
24 hardship determination?

25 A. Yes.

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2 Q. What were they?

3 A. The documents provided in the appeal
4 files for the agencies, the EEOC Guidance with
5 respect to undue hardship, and direct threat
6 to the extent panel members were considering
7 direct threat.

8 Q. So any scientific studies?

9 A. The reason I hesitate to answer that
10 question is because we are working from a
11 public health order that was based on a
12 scientific determination that was made by the
13 Commissioner of Health who was lawfully able
14 to find those determinations. It is not the
15 function of the reasonable accommodation
16 process or the Citywide Panel to question or
17 to demand evidence to support why the City
18 Health Commissioner was making a particular,
19 you know, requirement or why the public health
20 order was necessary.

21 Q. But these public health orders all
22 said that reasonable accommodation -- nothing
23 in the order should suggest that you shouldn't
24 reasonably accommodate employees. So what
25 from that did you take as saying you had to

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2 not reasonably accommodate those with sincere
3 religious beliefs?

4 MR. HAIDER: Objection.

5 A. I've never taken the position that
6 the City is not to accommodate sincere
7 religious belief.

8 Q. And yet you're saying to me right
9 now that you based your undue hardship
10 determinations for those with sincere
11 religious belief on the commissioner's order?

12 A. No, that's not what I'm saying. I'm
13 saying, you -- that was -- no, that's not what
14 I'm saying, no.

15 Q. So what are you saying about the
16 relevance of the commissioner's order to an
17 undue hardship determination?

18 A. I said the commissioner's order
19 contextualizes the basis and the process for
20 which we are proceeding, that there is a
21 public health emergency, that vaccination of
22 City employees is an important measure to
23 address that public health emergency, is all
24 within the context in which we're deciding
25 this. So, for example, there was no need to

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2 review scientific studies to determine whether
3 there was a public health emergency or to
4 review scientific studies to determine whether
5 by and large vaccination would be beneficial
6 to address that emergency.

7 And at least that's how I'm
8 understanding your questions now, which is,
9 did you do those things. And that is my
10 response, that we have a public health order
11 that I think, you know, establishes that
12 framework. But the specific undue hardship
13 analysis was about impact of granting
14 accommodations on agency operations. So the
15 reason that fits within the legal framework of
16 the health commissioner's order is because the
17 health commissioner's order requires
18 reasonable accommodations to the extent
19 permitted by law, and law requires -- allows
20 an agency to deny an accomodation on certain
21 grounds with respect to undue hardship.

22 Q. Going back to the personal rather
23 than religious distinction, a frequent reason,
24 and I'm not speaking about any particular, you
25 know, panels, but a frequent reason that came

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2 up in the notations on the spreadsheet was,
3 "Appellant explains his or her understanding
4 of her sincerely-held religious beliefs" --
5 oh, "Under appellant's," you know,
6 "explanation of his understanding of
7 sincerely-held religious belief, it is
8 ultimately appellant's choice whether to take
9 or abstain from food or medication."

10 So my understanding is you're saying
11 they have a sincerely-held religious belief,
12 but because they have a choice under their
13 religious belief system, we're going to deny
14 them; is that correct?

15 MR. HAIDER: Objection.

16 A. I -- yeah, I could not tell you for
17 sure without understanding the facts and
18 circumstances of --

19 Q. Well, this was regularly put in the
20 notations on the spreadsheet, and I'm trying
21 to understand what that means.

22 A. Well --

23 Q. So what would it mean for somebody
24 to have a sincerely-held religious belief that
25 allows for choice? Why would that be a basis

1 E. EICHENHOLTZ

2 for denial?

3 A. The record --

4 MR. HAIDER: Objection.

5 THE WITNESS: Sorry.

6 A. The record is important to
7 understand what that might mean in any
8 particular context. As I've explained many
9 times now, those determinations are based on
10 the balancing of a variety of factors, and I
11 could not give you an answer without
12 understanding the particular factors that may
13 have been at play in any particular case
14 because these determinations truly are
15 individualized.

16 Q. So but help me understand this,
17 because you said in your email response that
18 these notations on the spreadsheet are largely
19 shorthand for you, that they're not supposed
20 to explain anything to anyone else, correct?

21 A. They're not shorthand for me, no.
22 They're shorthand -- they're basically for the
23 panel members to take notes.

24 Q. Right. But they're not meant as
25 an -- they're not necessarily transparent for

1 E. EICHENHOLTZ

2 other people to understand what that means,
3 right?

4 MR. HAIDER: Objection.

5 A. Yeah, I'm not sure I understand that
6 question.

7 Q. They're for personal notes to
8 remember the basis for an exemption, correct?

9 A. Yes, yes, that's correct.

10 Q. Okay. So what would that type of
11 personal note indicate? And I'm going to back
12 up for a moment and say that I've noticed that
13 whenever someone has an objection based-
14 personal prayer, direction from personal
15 prayer, they get that notation. So what, in
16 your mind, are the Citywide Panel's approach
17 to these cases would say that that's not
18 religious in nature somehow?

19 MR. HAIDER: Objection.

20 A. I could not tell you without seeing
21 the factual circumstances in each case. I can
22 tell you that there have been cases involving
23 personal prayers that I voted to grant, and
24 there are ones that I voted to deny. It
25 depends on the factual circumstances of the

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2 records. It really -- it depends on what the
3 employee is describing and the nature of
4 their -- what the nature of their religious
5 belief is, the factual application, the other
6 facts that are present.

7 Q. Well, let's go back, then, a little
8 bit higher level. You made a distinction
9 between two kind of levels. One is a
10 sincerity analysis, does this person have
11 sincere religious beliefs. And the other, are
12 there religious beliefs actually in conflict
13 with the vaccine. You're nodding your head
14 yes, so I think we're on the same page.

15 A. Yes, yes. I'm sorry, I didn't know
16 if you were done with your question.

17 Q. It's fine, just for the record. I
18 know it's been a long day.

19 But so in the latter category of
20 these determinations that you say yes, they
21 have a sincere religious belief, that's
22 actually quite related to this kind of
23 notation, but we don't think that that's
24 actually holding them back from vaccination.
25 How in cases where the applicant is saying,

1 E. EICHENHOLTZ

2 yes, that my sincere religious belief is what
3 is holding me back from vaccination, how is it
4 permissible for you to step into their shoes
5 and say it's not?

6 MR. HAIDER: Objection.

7 A. Again, you would evaluate that on
8 the basis of objective facts, right? It's not
9 for me or any member of the panel to step into
10 someone's shoes and say this is who they are,
11 this is what they believe. It's looking at
12 all of the relevant facts of the particular
13 belief and making a determination as to
14 whether the employee has established that they
15 possess a belief that is in conflict with the
16 vaccine mandate.

17 Q. So in these cases where employees
18 say, I get my direction from prayer and god
19 just tells me not to take these vaccines, how
20 would that not be -- how would you say to
21 that, how would you respond to that, yes, they
22 have sincere religious beliefs, but these
23 beliefs aren't holding them back from
24 vaccination?

25 MR. HAIDER: Objection.

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2 A. So prayerful contemplation, while it
3 has a religious element to it, is not
4 necessarily establishing a religious belief
5 that conflicts with the vaccine mandate. So,
6 for example, if an employee were to say, I
7 think this vaccine is dangerous, so after
8 prayerful contemplation, I've chosen not to
9 take it --

10 Q. What if they don't say that? What
11 if they say, god told me not to take this
12 vaccine?

13 A. If they say, god -- then again, we'd
14 need to understand the facts and the
15 circumstances. You know, we spent a great
16 deal of time earlier in the deposition talking
17 about how we might review those sorts of
18 things factually. I won't recap it now, but
19 there are a lot of different factual analyses
20 and balancing that can go into play, you know,
21 if someone were to make that sort of assertion
22 that might compel a conclusion one way or the
23 other.

24 Q. Okay. Just a few more short
25 questions. So one question is about the DOE

1 E. EICHENHOLTZ

2 reviews.

3 You noted that the DOE reviews, the
4 Citywide Panel did about 500 of them; is that
5 about right?

6 A. I think it was closer to 550-plus,
7 but yes, it was lower than 600, I know that.

8 Q. Okay. Lower than 600.

9 And is your understanding -- I'm
10 going to tell you what I think the facts are
11 from before that process just so we know where
12 we are.

13 A. Yeah.

14 Q. The initial applications, the DOE
15 denied every one under undue hardship. The
16 arbitrators awards, some 165 were granted, and
17 then 550 or so denials from the arbitration
18 awards were sent to the Citywide Panel; is
19 that correct?

20 A. Based on my -- all I can tell you is
21 that roughly 550 to 600 were sent to the
22 panel. I cannot tell you with certainty what
23 category they were in and how they got there.
24 And I was focused on, you know, the DOE was to
25 file qualified candidates who needed to be

1 E. EICHENHOLTZ

2 reviewed by the panel, with the panel. And
3 when they came in, we took a look at those --

4 Q. Okay. So you don't know whether or
5 not everybody was denied initially at the DOE?

6 A. The ones that came to us certainly
7 were, as I said, because we don't hear appeals
8 of affirmances -- of grants, sorry.

9 Q. But you don't have any independent
10 knowledge of whether every one was denied
11 initially under undue hardship?

12 A. Yeah, I have no independent
13 knowledge of that.

14 Q. Okay. So how many did you grant
15 through the Citywide Appeals Panel for the
16 DOE?

17 A. I don't have that number, offhand.

18 Q. Can you get that number?

19 A. DOE cases? Certainly, as I said
20 before, we can obtain that information from
21 our databases --

22 Q. Are you aware if any teachers were
23 granted at the Citywide --

24 A. Yes, there were.

25 Q. Teachers; not administrators.

1 E. EICHENHOLTZ

2 A. My understand -- I mean, I could be
3 wrong, but my understanding was at least one
4 teacher, but I --

5 Q. So what would the difference be
6 between a classroom teacher that is accepted
7 and the rest that are told that they have
8 sincere religious beliefs, but it would be an
9 undue hardship to grant them accommodation?

10 MR. HAIDER: Ms. Gibson, our time is
11 up I'll obviously allow Mr. Eichenholtz to
12 answer this question.

13 A. Well, there could be teachers who
14 have non-classroom functions, for example.
15 But, you know, it depended on the particular
16 circumstances, and there were cases, as I
17 mentioned earlier, where the Department of
18 Education did not present an explanation of
19 undue hardship, and so we did not consider
20 undue hardship in cases where it was not, you
21 know, it was not presented as part of the
22 record, or at least I didn't, but I don't
23 think -- you know, so there were ones that
24 were -- where undue hardship wasn't a factor.

25 MS. GIBSON: Mr. Haider, I just have

1 E. EICHENHOLTZ

2 one more very short line of questioning.

3 Can I ask it?

4 MR. HAIDER: I'll allow two
5 questions.

6 MS. GIBSON: Okay. I just want to
7 do the background of --

8 Q. You can just correct me if I'm wrong,
9 because this is just background for the question.

10 A. Sure, sure.

11 Q. There was, and I'm sure you're aware
12 of it, an arbitration proceeding between the
13 DOE and Scheinman Arbitration that resulted in
14 an arbitration award that the Second Circuit
15 found unconstitutional or likely
16 unconstitutional, setting forth various
17 criteria, and there were also related
18 arbitrations that resulted in similar awards
19 for many other departments and union members.

20 My question is: Did you, before you
21 took your current position in October 2021,
22 did you participate in any of those
23 arbitration proceedings resulting in those
24 awards? I'm not talking about individual
25 people's, you know, arbitrations. I'm talking

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2 about, you know, the agency wide or department
3 wide ones, the award from Scheinman saying
4 this is the arbitration.

5 A. No, with the sole exception of I may
6 have been -- as the process was going on and
7 the people who were engaged in such processes
8 were doing it may have had my legal opinion
9 solicited on various issues --

10 Q. And was that legal opinion ever
11 solicited for suggested criteria for
12 determining religious accommodations?

13 A. I cannot say due to attorney/client
14 privilege.

15 MR. NELSON: Well, that was two
16 questions, and Mr. Eichenholtz, you get
17 the last word. So we thank you both, all
18 of you, really, for participating in this,
19 and we look forward to seeing you again.

20 MR. HAIDER: I hope not. Thank you,
21 Mr. Nelson.

22 THE VIDEOGRAPHER: This concludes
23 today's deposition. The time is 5:59.
24 We're now off the record.

25 (Time noted: 5:59 p.m.)

A C K N O W L E D G M E N T

STATE OF NEW YORK)

:SS

COUNTY OF)

I, ERIC EICHENHOLTZ, hereby certify
that I have read the transcript of my
testimony taken under oath in my deposition of
May 24, 2022; that the transcript is a true,
complete and correct record of my testimony,
and that the answers on the record as given by
me are true and correct.

ERIC EICHENHOLTZ

Signed and subscribed to before
me, this day
of , 20__.

Notary Public, State of New York

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-----I N D E X-----

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	MS. GIBSON	305

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113, 114, 116, 117, 125, 132, 164, 246, 256,
275, 286, 288, 307

RULING: 255

-----DOCUMENT PRODUCTION-----

PAGE	22	Recordings of agency personnel officer and EEO officer calls
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	150	Redacted copy of model acceptance
	215	Any written materials that may have been disseminated to Citywide Appeal Panel members
	267	Any writings that reflected or constituted any of that information from the DOE regarding the remote sites

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-----DOCUMENT PRODUCTION (cont'd)-----

PAGE 281 Procedure for information on copies
of such communications made to each
agency that received at least remand

-----EXHIBITS-----

EICHENHOLTZ FOR I.D.

EX 1 Email chain of November 2021 138

C E R T I F I C A T E

STATE OF NEW YORK)

) SS.:

COUNTY OF SUFFOLK)

I, KRISTI CRUZ, a Notary Public
within and for the State of New York, do
hereby certify:

That the witness whose deposition
is hereinbefore set forth, was duly
sworn by me and that such deposition is
a true record of the testimony given by
such witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage; and that I
am in no way interested in the outcome
of this matter.

IN WITNESS WHEREOF, I have
hereunto set my hand this 28th day of
May 2022.



KRISTI CRUZ

ERRATA SHEET

VERITEXT LEGAL SOLUTIONS

NAME OF CASE: NYFRL V. CITY OF NEW YORK

DATE OF DEPOSITION: MAY 24, 2022

NAME OF WITNESS: ERIC EICHENHOLTZ

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Subscribed and Sworn before me

this _____ day of _____, 20__.

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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